

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

WILLIAM DOUGLAS HANING,

Defendant.

No. 4:18-CR-00139-RWS-NAB

**GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANT'S  
RENEWED MOTION TO DISMISS INDICTMENT, OR IN THE ALTERNATIVE,  
MOTION TO DISQUALIFY PROSECUTION TEAM**

While defendant Haning's motion to dismiss the indictment and alternative motion to disqualify certain prosecutors from participating in the prosecution against him was pending but not yet ruled (D.E. 72), and following the return of a superseding indictment (D.E. 83), Haning filed a renewed motion to dismiss directed at the superseding indictment and also renewed his alternative motion to disqualify certain prosecutors from participating in the prosecution team (D.E. 88). Because the renewed motion (D.E. 88) is as meritless as the original motion (D.E. 72), the Government respectfully asks this Court to summarily deny both motions to dismiss and further deny any and all requests to disqualify certain prosecutors from being part of the prosecution team.<sup>1</sup>

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<sup>1</sup> In D.E. 79, the Government responded to defendant Haning's original motion to dismiss and his alternative motion to disqualify members of the prosecution team. That response is equally applicable to Haning's renewed motion directed at the superseding indictment, and said response is incorporated herein by reference with respect to Haning's renewed motion. For the court's convenience, a copy of D.E. 79 is attached to this pleading.

### **Procedural Background**

On November 2, 2017, Associate Deputy Attorney General Scott Schools approved the recusal of the United States Attorney's office for the Eastern District of Missouri from the investigation and prosecution of *United States v. Custom Ag. Commodities, et al.*<sup>2</sup> and all related litigation. In a detailed memo (Attachment 1), the notice of recusal assigned supervision of the investigation and prosecution of the matter to the Western District of Missouri, and directed and authorized then Acting United States Attorney Thomas M. Larson or his successor to "conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before magistrate judges, which the United States Attorney for the Eastern District of Missouri is authorized by law to conduct regarding this matter, and related matters."

The assignment to the WDMO USAO also authorized specified Assistant United States Attorneys and personnel from the Eastern District of Missouri to continue working on the matter under the supervision and direction of the WDMO USAO, to include EDMO AUSAs Charles Birmingham, Gil Sison, and Kyle Bateman, as well as EDMO legal assistants Patricia Rockers and Julie Hurst, and EDMO IT Specialist Beau Toth.

On November 14, 15, and 16, 2017, EDMO AUSAs Charles S. Birmingham, Gilbert C. Sison, and Kyle Bateman were appointed Special Attorneys to the United States Attorney General (hereafter "Special Attorneys") pursuant to 28 U.S.C. § 515. (Attachments 2-4) On November 14, 2017, WDMO AUSA Kathleen Mahoney was appointed to the same position. (Attachment 5)

Thomas Larson was the Acting United States Attorney for the Western District of Missouri at the time of the recusal in November 2017. Thereafter, Timothy A. Garrison became the

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<sup>2</sup> 'Custom Ag Commodities, et al.' was the designation given to the original U.S. Attorney's Office internal file. The related litigation under this umbrella includes *U.S. v. Rychlik, et al.* (17-CR-00100), *U.S. v. Haning* (18-CR-00139), and *U.S. v. McKinney* (18-CR-00414).

Presidentially-appointed, Senate-confirmed United States Attorney for the Western District of Missouri. To be clear, Mr. Garrison began serving as the Interim USA on January 5, 2018, and on April 26, 2018, the interim designation was removed following his confirmation by the United States Senate.<sup>3</sup> The November 2017 recusal specifically authorizes Acting United States Attorney Thomas Larson or his successor to exercise full authority in any aspect of the recusal matter.

It is worth pausing here to remind the Court that the Government has been openly transparent with this Court on all aspects of the recusal and the way in which it has been implemented in all the related proceedings occurring in this district. Shortly after Messrs. Birmingham, Sison, and Bateman were appointed as Special Attorneys to the Attorney General and entered their appearance as such in Case No. 17-100-NAB, counsel representing Diversified Ingredients, Inc. in Case No. 17-100-NAB filed a written objection to the entry of appearance of said Government counsel as Special Attorneys to the Attorney General. D.E. 65, Case No. 17-100-NAB. This Court held a hearing on December 7, 2017, to consider the objection. D.E. 69, Case No. 17-100-NAB. The transcript from that hearing is instructive (the full transcript is attached as Exhibit 6) because it convincingly demonstrates that from the outset, the Government has proceeded in an entirely straightforward matter regarding the recusal.

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<sup>3</sup> On January 4, 2018, Attorney General Jeff Sessions appointed Timothy A. Garrison as Interim United States Attorney for the Western District of Missouri. While Garrison was serving as the Interim United States Attorney, President Donald J. Trump on February 20, 2018, submitted to the United States Senate Garrison's nomination to serve as the Presidentially-appointed Western District of Missouri United States Attorney. On April 26, 2018, the United States Senate unanimously confirmed Garrison's nomination to serve as the Western District of Missouri United States Attorney. Senior Eighth Circuit Judge Duane Benton thereafter administered the oath of office to Garrison and he began serving as the Presidentially-appointed, Senate-confirmed United States Attorney for the Western District of Missouri. In summary, it is beyond dispute that the Western District of Missouri has had a lawfully appointed United States Attorney in place at all times relevant to the pending defense motions to dismiss and disqualify.

When asked to address the merits of the objection, Mr. Birmingham confirmed to this Court the facts of the recusal as set forth above. Mr. Birmingham stated:

[T]he Government recognized the conflict when Jeff Jensen was appointed U.S. Attorney for the Eastern District of Missouri and asked both in the civil case and in the criminal case for an opportunity to appropriately resolve that conflict before there were any other proceedings in either matter. On November 2nd, after our office (the Eastern District of Missouri ) notified the Department of Justice and the Office of General Counsel of the conflict, there were certain discussions, and it resulted in a Notice of Recusal for the Eastern District of Missouri that we received on November the 2nd. The Associate Deputy Attorney General approved the recusal of the United States Office of the Eastern District of Missouri for the case based on that existing conflict as to Jeff Jensen as the United States Attorney. And just for the record, he (Jeff Jensen) had entered essentially as local counsel here on this matter on behalf of Wilbur-Ellis.

In recusing the Eastern District of Missouri, the Deputy -- Associate Deputy Attorney General specifically authorized and directed certain appointments. First, as the -- the case or the matter was assigned to the Western District of Missouri and has directed and authorized the Acting United States Attorney, Tom Larson, to conduct any of the proceedings in the matter and the United States Attorney for the Eastern District of Missouri that the United States Attorney for the Eastern District of Missouri could do. The Associate Deputy Attorney General also authorized specifically Assistant United States Attorneys, myself and Gil Sison, to continue working under -- working on the matter under the direction of the Western District of Missouri. That notice and that appointment and those procedures also directed that -- that -- that any Assistant United States Attorney subsequently assigned, me -- myself and Gil Sison, to the matter be appointed as Special Attorneys to -- in order to appear on behalf of the Government in the Eastern District of Missouri and that those appointments then -- we sought out those appointments over the next week or two in reference to the matter.

As Special Attorney assigned in the matter as reflected in our entry that we filed, those pleadings and documents filed in the case, we were directed to use the signature block of the Western District of Missouri with the addition of the Attorney General's name preceding that for the United States Attorney. So that -- that all happened on November 2nd. November 8th, the Criminal Chief for the Western District of Missouri provided myself and Gil Sison a checklist for prior supervisory review and approval requirements, and those prior supervisory review and approval requirements for the Western District included all charging decisions, all plea agreements, 5K motions, sentencing recommendations and so forth. In other words, all -- the Western District was going to review and approve all -- all those case developments. We were provided that checklist, and then we were provided with the appointment letter that was attached to the Government's response to the

objection to the Entry of Appearance. That Special Attorney appointment to the United States Attorney General was subject to the terms of the conditions that both Mr. Sison and myself were required to agree to. Specifically, they included, with regard to all matters handled by myself and Mr. Sison as Special Attorney, we will report to and act under the direction of the United States Attorney General or his delegate, the United States Attorney for the Western District of Missouri. And the Court has both our signed appointment letters affirming that those terms and conditions are agreeable. We entered our appearance as directed. The style of the appearance is as set forth in the notice. "Specifically comes now Tom Larson, Acting United States Attorney for the Western District of Missouri, and Charles S. Birmingham and Gilbert C. Sison, Assistant United States Attorneys for said district, and hereby enter their appearances on behalf of the United States." And then the designee being Jefferson Sessions, United States Attorney General as well as Tom Larson.

Those -- Those are the proceedings that the Government undertook from the time that we asked that the status conference previously set proceed up until this point. So, obviously, the Western District is getting up to speed on the case. Any plea agreements, any new charges, so forth, would be subject to their review, their supervision. We're acting under their direction and under their authority. So my hope is by clarifying those procedures, those requirements, that the objection that was filed, based on that additional information, we wanted to afford Diversified an opportunity to withdraw that objection, given the procedures that the Government's taken to address the actual conflict and any appearance of conflict, and we're ready to provide additional status as to how we think the case is proceeding thereafter. But maybe it's more appropriate to see where we stand on the objection.

Transcript, D.E. 71, Case No. 17-100-NAB, pages 5-9.

When counsel for defendant Diversified Ingredients responded by telling this Court that notwithstanding Mr. Birmingham's representations his client intended to persist in pursuing the objection, the following colloquy occurred when this Court asked Mr. Birmingham if there was any precedent for the recusal process being used in this case:

MR. BIRMINGHAM: I think -- A couple of points, Your Honor. A similar issue was addressed in the last few years in the matter of Mr. Sigillito --

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THE COURT: That's what I was thinking, that we have been through this before.

MR. BIRMINGHAM: -- in that Steve Holtshouser was the Lead AUSA, and there was a conflict both as to the office based on a victim and a relationship but there was also within the Court --

THE COURT: The Court, yeah.

MR. BIRMINGHAM: -- as well, and that the -- the same remedy or the same manner of addressing the conflict and appearance of conflict that the Government's taken in this case is what was taken --

THE COURT: Okay.

MR. BIRMINGHAM: -- what was done in Mr. Sigillito's case where Mr. Holtshouser entered as a Special Attorney. He was under the supervision and direction of the Western District. Pleas that occurred in that case were approved by the Western District, and sentencing recommendations were also approved and directed out of the Western District. So this is-- this is not an extraordinary path that we're taking. It's consistent with what the U.S. Attorney's Office has done in the past and has been approved by the Court as a reasonable approach to addressing a conflict such as this.

. . . . .

I believe that was what was occurring in Sigillito where you had line prosecutors that had invested time on the facts and the legal issues of the case. As long as they are subject to the supervision of the Western District, it is appropriate to carve out certain individuals to continue to work on the case but under different supervisors and under a different U.S. Attorney. So in this instance, Mr. Larson out of the Western District, and then we have a Criminal Chief out of the Western District and then a White Collar supervisor who are all working with Mr. Sison and myself and approving anything that we do as it relates to charges, new charges, plea agreements and so forth.

Transcript, D.E. 71, Case No. 17-100-NAB, pages 14-15, and 16.

Based on what transpired during this hearing, this Court overruled the objection to the entry of appearance of Government counsel as Special Attorneys to the Attorney General. Transcript, D.E. 71, Case No. 17-100-NAB, pages 21-22. Counsel for Diversified Ingredients never revived the issue in the form of any other motion and, in fact, later withdrew the objection (D.E. 80) and defendant Diversified Ingredients in July 2018 entered an unconditional guilty plea pursuant to a plea agreement. D.E. 110-113.

The December 7, 2017, hearing confirms that the Government’s prosecutors in this case more than a year ago were clearly and unequivocally on the record before this Court that they appear as Special Attorneys to the Attorney General; are subject to the supervision of a conflict-free supervisory structure from the United States Attorney’s Office in the Western District of Missouri; and, that the *Sigillito* case prosecuted in this district provides a judicially-approved template for doing so. In fact, as we discuss *infra*, *United States v. Sigillito*, 759 F.3d 913 (8th Cir. 2014), is binding circuit precedent that upholds the propriety of the recusal of the EDMO USAO in this case, upholds the assignment of this case to the WDMO USAO, and upholds the use of Special Attorneys under the supervision of the WDMO USAO, regardless of whether the prosecutor is located in EDMO or WDMO, where none of the Special Attorneys has an actual conflict of interest.

#### **Arguments and Authorities**

Defendant Haning asserts that the Government “refused to respond to what is the most fundamentally important discovery request a defendant can make: who is directing and supervising this prosecution?” D.E. 88 at pg. 14.

Attachment 1 to this pleading contains the answer to the question posed, and since it also was filed as Attachment 1 to the Government’s November 28, 2018, response to defendant’s motion to dismiss (D.E. 79), it was known and available to the defense prior to the filing of D.E. 88. It is clear from the recusal paperwork in Attachment 1 that the WDMO USAO is in charge of the case. The recusal notice explicitly states that “ADAG Schools has assigned this matter to the Western District of Missouri and, pursuant to 28 U.S.C. § 515(a), has directed and authorized Acting United States Attorney Thomas Larson or his successor to conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before magistrate

judges, which the United States Attorney for the Eastern District of Missouri is authorized by law to conduct regarding this matter, and related matters.” (emphasis added).

This recusal fully complied with United States Attorneys’ Procedure (USAP) No. 3-2.170.001, which sets forth the Department of Justice’s policies and procedures governing recusals. This USAP took effect on June 4, 2004, remained in effect during the time defense counsel served in the Department of Justice from 2009 through 2013, and remains in effect today.

USAP No. 3-2.170.001 (6)(B) states that the “Deputy Attorney General has authority to approve the recusal of a United States Attorney or USAO (United States Attorney’s Office) and, pursuant to 28 U.S.C. § 515, to appoint an Attorney for the United States, another USAO, or other official responsible for the matter. The Deputy Attorney General has delegated that authority to the Associate Deputy Attorney General (ADAG). The ADAG reviews a request for recusal from EOUSA GCO (Executive Office of United States Attorneys, General Counsel’s Office), either approved or denies the request, informs EOUSA GCO of the recusal decision, and approves the reassignment of the matter.”

USAP No. 3-2.170.001 (6)(C)(2)(b)(1) applies to a criminal matter or case and states that “[o]nce the ADAG has approved the office-wide recusal of a USAO in a criminal matter or case, the EOUSA GCO will notify the Criminal Division and proximate USAOs of the ADAG’s decision to recuse the USAO, to determine if either will assume responsibility for the matter or case. If both a USAO and the Criminal Division seek to handle the matter or case, or conversely if neither the Criminal Division nor any other USAO is willing to handle the matter, the ADAG will resolve the impasse by designating the office that will handle the matter or case. After a USAO assumes responsibility for a matter or case from a recused USAO, any AUSA who will be

assigned to handle the matter or case must be appointed as a Special Attorney under 28 U.S.C. § 515.”

USAP No. 3-2.170.001(6)(C)(2)(c) states that “once recusal of the matter or case has been approved by the ADAG and the matter or case has been transferred to a new USAO or the Criminal or Civil Division, the matter or case no longer belongs in any sense to the recused USAO. When a new USAO assumes responsibility for the recused case, it should process the case from the investigatory stage through and including any post-judgment actions, including any appellate work or actions required by the Financial Litigation Unit (FLU). The Special Attorney assigned the matter or case should sign any pleadings or documents using the signature block of the newly assigned USAO, with the addition of the Attorney General’s name preceding that of the United States Attorney.”

The recusal notice contained in Attachment 1, on its face, reflects how these USAP provisions were implemented in this recusal case. The Deputy Attorney General (or his appointed delegate, e.g., in this case, ADAG Schools) can and did authorize a United States Attorney appointed in one district (WDMO) to take over a case in another district (EDMO). That is all that happened here.

The recusal paperwork makes it explicitly and abundantly clear that the WDMO USA is in charge of the case. The recusal notice explicitly states that “ADAG Schools has assigned this matter to the Western District of Missouri and, pursuant to 28 U.S.C. § 515(a), has directed and authorized Acting United States Attorney Thomas Larson or his successor to conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before magistrate judges, which the United States Attorney for the Eastern District of Missouri is authorized by law to conduct regarding this matter, and related matters.” (emphasis added).

It could not be more clear that all authority that the EDMO USA typically has in any and every case within the EDMO was, for the purposes of this case and any other related to it, delegated to the WDMO USA. Stated differently, all that has happened in this recusal is that the WDMO USA stepped into the shoes of the EDMO USA for all purposes related to this case. The WDMO USA was given the authority, for the purposes of this case and any other related to it, to undertake any aspect of criminal investigation and prosecution that the EDMO USA has authority to undertake in this district. The normal direction and supervision of federal criminal litigation in this district by the EDMO USA was given to the WDMO USA for the purpose of this case and any others related to it

The simplicity of the concept is reinforced and evident in the appointment letters for each Special Attorney which state “[w]ith regard to all matters handled by you as a Special Attorney, you will report to and act under the direction of the United States Attorney General or his delegee, the United States Attorney for the Western District of Missouri.” (emphasis added). Again, it could not be any more clear that the United States Attorney for the Western District of Missouri is in charge of this case, that he was given that authority by virtue of the recusal issued on November 2, 2017, and has been exercising that authority ever since.

Not surprisingly, there is a chain of command in the WDMO USAO just as there is in every USAO. The November 2, 2017, recusal paperwork/notice is explicitly addressed to Tom Larson as the WDMO Acting United States Attorney and Gene Porter as the WDMO Criminal Division Chief. The notice later explicitly states that the recusal point of contact for the Western District of Missouri is “Criminal Division Chief Gene Porter.”

Based on all the papers documenting the recusal and how it has been implemented by the WDMO USAO, the current relevant chain of command for this recusal case, from top to bottom,

is WDMO USA Tim Garrison, WDMO Criminal Chief Gene Porter, WDMO Fraud and Public Corruption Unit Chief Kate Mahoney (as a Special Attorney), and Charles Birmingham, Gilbert Sison, and Kyle Bateman as the line prosecutors on the case (also as Special Attorneys).

When defense counsel asked “who is directing and supervising this prosecution” the Government did not refuse to respond, but told defense counsel to “[p]lease re-read the documents because they contain all the answers to your questions.” To summarize, there is no constitutional crisis in this case. Pursuant to standard recusal policies and procedures, and more than a year before Matthew G. Whitaker was appointed as the Acting Attorney General, the Department of Justice assigned the supervision of this case to the United States Attorney for the Western District of Missouri (Attachment 1). No different from any other matter or case undertaken by the United States Attorney for the Western District of Missouri, the WDMO USA does not need any further approval or supervision from the Attorney General or any other official in the Department of Justice to pursue investigative and prosecutive actions in this case. A fully appropriate WDMO chain of command is in place to supervise those who are working on this case, and every attorney who has appeared or will appear before this Court on this case has been appointed as a Special Attorney for that purpose (Attachments 2-5). Everyone working on this case will act, and has acted, within the supervisory structure of the WDMO USA (Attachments 1 and 6)

Haning suggests that failure to comply with the recommendation in USAP No. 3-2.170.001(6)(C)(2)(c) that “a Special Attorney assigned the matter or case should sign any pleadings or documents using the signature block of the newly assigned USAO, with the addition of the Attorney General’s name preceding that of the United States Attorney” is evidence that the attorneys working on the case are not really working as Special Attorneys under the supervision of the WDMO USAO but instead, are really working as EDMO AUSAs.

Haning points to two isolated and aberrant instances in which pleadings and documents associated with this case failed to contain the recommended signature block.<sup>4</sup> One example is the superseding indictment and the other is a grand jury subpoena. Haning asserts that these are not typos or a technical/clerical error but rather, are “legally significant and demand this Court’s attention,” D.E. 88 at page 15. Haning cites no law or legal authority to support this claim:

First, it is important to note the language in USAP No. 3-2.170.001(6)(C)(2)(c) states that “a Special Attorney assigned the matter or case should sign any pleadings or documents using the signature block of the newly assigned USAO, with the addition of the Attorney General’s name preceding that of the United States Attorney (emphasis added), as compared to the language in USAP No. 3-2.170.001 (6)(C)(2)(b)(1) which states that after “a USAO assumes responsibility for a matter or case from a recused USAO, any AUSA who will be assigned to handle the matter or case must be appointed as a Special Attorney under 28 U.S.C. § 515” (emphasis added).

Use of the word “should” denotes a recommendation or advice, not a requirement. And use of the word “must” denotes a requirement or obligation, not a recommendation. The failure to comply with a recommendation or advice is not legally significant.

Here, the defendant cannot legitimately claim that the Government has not complied with the requirement that every prosecutor who has or will appear before this Court in this case must be appointed as a Special Attorney. On the other hand, there has not been consistent compliance with the recommendation that each such appointed Special Attorney use a signature block evidencing the existence of their appointment as such a Special Attorney. Nonetheless, and

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<sup>4</sup> Haning ignores every other instance where the recommended signature block was used. See Attachment 7 as well as the charging documents filed in *U.S. v. Rychlik, et al.* (17-CR-00100).

contrary to the speculation set forth in defendant Haning's moving papers, the failure to use the recommended signature block has no independent legal significance.

For example, the signature block on the superseding indictment omits mention of the United States Attorney General and the United States Attorney for the Western District of Missouri, but the signature block does identify the three prosecutors as each being a "Special Attorney to the Attorney General." Given the explicit reference to their status as a "Special Attorney to the Attorney General" there cannot be any serious or good faith claim as to what authority is being invoked by the prosecutors appearing before the grand jury.

Moreover, we know that use of the recommended signature block would not have satisfied the defense. As made plain in the moving papers filed by defense counsel, if we had used the recommended signature block for the superseding indictment, defense counsel still would have argued that the superseding indictment was invalid because, according to defense counsel, the inclusion of the name of Acting Attorney General Whitaker means that the action is ultra vires, invalid, and without legal authority. *See* D.E. 88 at page 11.

Based on what was known from the tenor and substance of the original motion to dismiss filed by the defense, the prosecution team had a choice to make, because no matter how the signature block was constructed, the defense would argue that the superseding indictment was invalid. The WDMO USAO supervisory chain of command reviewed and approved the decision to use the modified signature block on the superseding indictment so as to leave no doubt that the superseding indictment was being presented by the same Special Attorney to the United States Attorney General who presented the initial indictment to the grand jury, and whose entry of appearance as Special Attorney to the United States Attorney General was on file with the court and continues to this day as part of this case. (D.E. 4 and 8).

Doing so insured that there was no confusion about who was signing the superseding indictment before the grand jury, i.e., it was a Special Attorney to the United States Attorney General. In any event, “[t]he signatures on the indictment are a formality, and even the lack of signatures would not render an indictment invalid.” *United States v. Morse*, 613 F.3d 787, 793 (8th Cir. 2010). As noted in *Morse*, Fed.R.Crim.P. 7(c)(1) requires only that the indictment be signed by an attorney for the Government, and the lack of a signature is at most a technical deficiency. *Id.* Here, there is no room to reasonably dispute the fact that the superseding indictment was signed by an attorney for the Government, i.e., a Special Attorney to the United States Attorney General, appointed as such since November 2017, and the decision not to use the complete recommended signature block has no legal significance whatever, much less supplying justification for dismissal of the superseding indictment.

Similarly, the issuance of a grand jury subpoena that identifies the requesting prosecutor as an Assistant United States Attorney instead of as a Special Attorney was, at most, a technical error. Note that the subpoena explicitly references the internal USAO file number for this recusal case, where all of the attorneys working on the case have been appointed as Special Attorneys. When the subpoena explicitly references the internal USAO file number for this recusal case, and where the attorney requesting the subpoena has been appointed as Special Attorney, the misidentification of the prosecutor as an Assistant United States Attorney has no independent legal significance, much less providing a basis for dismissal of an indictment.

Moreover, it is beyond dispute that the subpoena was issued on the form supplied for use by the Court (<http://www.uscourts.gov/sites/default/files/ao110.pdf>), and the form inserts the title “Assistant United States Attorney” when asking the person filling out the form to identify the name of person who requested the subpoena (<http://www.uscourts.gov/sites/default/files/ao110.pdf>).

The subpoena contains only the signature of the Clerk/Deputy Clerk. The prosecutor who requested issuance of the subpoena was appointed as a Special Attorney to the Attorney General long before the subpoena was issued, and that appointment was on file with the United States District Court long before the subpoena was issued.

We acknowledge that there is room for possible confusion by a third-party recipient when a standard court-supplied form inserts the title “Assistant United States Attorney” and the attorney requesting issuance of the subpoena is instead an appointed Special Attorney for the United States Attorney General. But there is no room to suggest, on this record, that the use of that title by the form, or on the form, provides any evidence that the actions taken by the prosecutors were unlawful or in any way prejudicial to the defendant. Such a suggestion is nonsense. Failure to always use the recommended signature block for all papers and documents associated with this investigation and prosecution perhaps leaves the members of the prosecution team open to criticism for creating a paper document that could potentially cause confusion. However, any failure to always use the recommended signature block for all papers and documents associated with this investigation and prosecution does not provide any evidence that the actions taken by the prosecutors were unlawful or in any way prejudicial to the defendant.

Going forward, the Government will ensure that all pleadings and documents are signed with the recommended signature block. At the same time, as we noted above, had we done so with the superseding indictment, there is no doubt that the defense still would not be content. We would instead be addressing the argument that the superseding indictment must be dismissed because the Acting Attorney General in whose name the charging document was pursued is not a Senate-confirmed United States Attorney General.

As we said in our response to Haning's initial motion to dismiss, the 115,000 member Department of Justice is not a house of cards that falls whenever it is not headed by a Senate-confirmed United States Attorney General. Under the Code of Federal Regulations, the Attorney General delegated to the Deputy Attorney General the "appointment of special attorneys and special assistants to the Attorney General." 28 C.F.R. § 0.15(b)(1)(ii). And the Deputy Attorney General has the authority to redelegate this authority to other officials. 28 C.F.R. § 0.15(c)(3). In this case, and pursuant to a lawful delegation from the Deputy Attorney General, Scott Schools, who was an Associate Deputy Attorney General (Attachment 1), and who reported to the Deputy Attorney General, authorized the appointment of all the Special Attorneys in this case. And all of this occurred while Jefferson B. Sessions was the Presidentially-appointed and Senate-confirmed Attorney General of the United States.

The current Acting Attorney General had nothing to do with the appointment of any of the Special Attorneys involved in this case.<sup>5</sup> The recusal authorizing the United States Attorney for

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<sup>5</sup> This fact spotlights one additional defect in the defense motion, i.e., Haning lacks standing to challenge the lawfulness of Mr. Whitaker's designation as Acting Attorney General. The appointment did not precipitate the criminal investigation of Haning years ago nor his indictment in February 2018. Haning instead has raised what the Supreme Court calls nothing more than "a generally available grievance about government," and such grievances do "not state an Article III case or controversy." *Hollingsworth v. Perry*, 570 U.S. 693, 706 (2013) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-574 (1992)); see, e.g., *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (noting that Article III requires the demonstration of a "particularized" injury, meaning one that "affect[s] the plaintiff in a personal and individual way")(citation omitted). At least one district court similarly found a lack of standing when a defendant sought to challenge the constitutionality and lawfulness of the appointment of an interim United States Attorney. *United States v. Baker*, 504 F.Supp.2d 402, 409 (E.D.Ark. 2007)(defendant does not have standing to challenge legality or constitutionality of the appointment of interim United States Attorney). The *Baker* court also cited *United States v. Suescun*, 237 F.3d. 1284, 1287-88 (11th Cir. 2001), where the court held that even assuming an appointment was made in violation of the Appointments Clause, the invalid appointment "did not deprive the district court of jurisdiction to entertain the case and adjudicate Suescun guilty of the charged offenses." We raised this same argument in our initial response to defendant's first motion to dismiss (D.E. 79 at pgs. 19-21).

the Western District of Missouri to exercise full authority over this case took effect nearly a year prior to the appointment of the Acting Attorney General. The United States Attorney for the Western District of Missouri was given then, and still has today, clear and unquestioned authority to supervise the Special Attorneys involved in this case. Speculation that the Acting Attorney General might take some action affecting this case might be warranted in partisan political conversations, but cannot support the grant of legal relief in this case, much less the drastic relief of dismissing the indictment.<sup>6</sup>

Defense counsel also criticizes the Government because the response filed in opposition to his initial motion to dismiss, in part, relied on the arguments advanced by the Solicitor General in response to a similar issue before the United States Supreme Court. There is nothing wrong or inappropriate about the fact that the Department is committed to presenting consistent nationwide responses when similar or identical issues arise in different venues across the country.

As explained in our initial response, the President's designation of the Acting Attorney General was valid, but the Court need not address the designation's validity in this case. That is because the legal authority of the Department of Justice to prosecute this case does not depend in any way on whether a vacancy in the office of Attorney General has been properly filled. The

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<sup>6</sup> The defendant's overt attempt to inject partisan politics into this litigation is evident when counsel argues, without citing any source, that at "no other time in history has the President forced out the Attorney General and replaced him with a non-confirmed appointee, refusing to submit him or anyone else to the Senate for confirmation" (D.E. 88 at page 4). Contrary to these assertions, on December 7, 2018 (exactly one month after the resignation of Jefferson B. Sessions), the President officially announced William P. Barr as his nominee, subject to Senate confirmation, to succeed Sessions as the Attorney General of the United States. So much for defense counsel's speculation that President Trump never intended to submit an Attorney General nomination to the Senate for confirmation. Defense counsel's moving papers also rely on op-ed pieces in the *New York Times* as authority for the argument that President Trump's appointment of Acting Attorney General Whitaker is illegal and unconstitutional (D.E. 88 at page 15). The opinion page of the *New York Times* is not a recognized authority for the support of legal arguments.

prosecution is being supervised by a United States Attorney pursuant to statutory authority, and the United States Attorney is supervised by the Senate-confirmed Deputy-Attorney General.

We explained at length in our original response the manner in which the appointment of Acting Attorney General Whitaker complied with the requirements of the Federal Vacancies Reform Act (FVRA). D.E. 79 at pgs. 8-12. The newly filed motion to dismiss never addresses these arguments and legal authorities. To be clear, and with the help of the Solicitor General's Office, for which we make no apologies, we cited legal authorities – statutes, case law, and legislative history – to support our argument. Defense counsel's newly filed motion relies on the op-ed page of the New York Times (D.E. 88 at page 15). Ignoring the merits of the arguments provides this Court with no help in resolving the legal issues present, represents a tacit concession that the Government's arguments are meritorious, and leaves this Court with only shallow and empty mockery in place of legal analysis.

Defense counsel also criticizes the Government for our alleged failure to acknowledge that Jeff Jensen formally represented defendant Haning. Defense counsel knows that this criticism is unwarranted. While this matter was in the investigative stage, Jeff Jensen (then in private practice as the Husch law firm) became aware that his client, Wilbur-Ellis Company, was a target of the Government's investigation. Also while this matter was in the investigative stage and he was in private practice with the Husch firm, Jeff Jensen became aware that Doug Hanning, who was a Wilbur-Ellis Company employee during part of the time covered by alleged criminal conduct, also could be regarded as a target of the Government's investigation. Based on this awareness, Jeff Jensen promptly arranged for Hanning to be represented by separate counsel to avoid any conflict of interest between the potentially competing interests of Wilbur-Ellis and Haning. Defense counsel's firm has been representing Haning for criminal purposes ever since.

All of these events occurred before Jeff Jensen became the United States Attorney for the Eastern District of Missouri. After Jeff Jensen became the United States Attorney for the Eastern District of Missouri, and to appropriately address the issue of his former representation of Wilbur-Ellis Company, the recusal process was promptly undertaken. In fact, Jeff Jensen withdrew from representation of Wilbur-Ellis Company **prior** to the date he officially became the EDMO USA.

As soon as anyone knew there was a need for Doug Hanning to be separately represented, Jeff Jensen did the exact right thing and arranged for Haning to have legal counsel separate from the attorney representing Wilbur-Ellis Company. Defense counsel's law firm has been separately representing Haning ever since anyone knew there was a need for Haning to have separate representation.<sup>7</sup>

The separate representation of Haning by defense counsel's firm, and the recusal of Jeff Jensen from this case and others related to it, provides clear evidence that everything related to ethical conflicts of interest has been properly addressed. By virtue of the recusal, Jeff Jensen cannot participate in this case, and has not participated in this case. If there was a joint-litigation agreement in place at some point in time between counsel for Haning and Jensen as counsel for Wilbur-Ellis, the recusal insures that any confidential or privileged information Jensen acquired

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<sup>7</sup> The Husch law firm, but not Jeff Jensen himself, represented Haning in the related civil litigation. *See* Case No. 14-CV-859 RWS. On March 11, 2016, the Husch attorneys representing Haning (Randal K. Mullendore and Kyle Seelbach) moved for leave to withdraw from representing Haning. D.E. 673 in 14-859. On March 14, 2016, Adam Hochschild and Carolyn Geoghegan with the Runnhymede law group entered their appearance as counsel for Haning. D.E. 676 and 677 in 14-850. On March 14, 2016, District Judge Sippel entered a docket text order granting the motion to withdraw. D.E. 674 in 14-859. Jeff Jensen did not personally represent Haning in either the related civil litigation or in any criminal investigation or filed proceeding. Defense counsel's firm has represented Haning throughout the criminal investigation and has continued to do so post-indictment.

will not be used to Haning's detriment. Stated simply, any actual conflict of interest attributable to Jensen is resolved because he has no ability to participate in or influence this case. And as we know from the *Sigillito* case, the only conflict of interest that matters is an actual conflict of interest.

In *United States v. Sigillito*, 759 F.3d 913, 927-929 (8th Cir. 2014), the EDMO USAO was recused and the WDMO USAO was assigned responsibility for prosecuting the case. All members of the prosecution team were appointed as Special Attorneys and were directly supervised by the WDMO USA and/or her designees. One member of the prosecution team was WDMO AUSA Jess Michaelson, serving in his capacity as a Special Attorney. Two other members of the prosecution team were EDMO AUSAs Steven Holtshouser and Richard Finneran, also serving as Special Attorneys. To be clear, the exact same recusal protocol used in this case also was implemented in the *Sigillito* case.

Defense counsel argues that the *Sigillito* case has no applicability to this case, and that the issues raised in *Sigillito* are different from the issues raised in this case. Defense counsel is mistaken, and we need look no further than the language from the Eighth Circuit's opinion to know that defense counsel is mistaken.

*Sigillito* makes two arguments relating to the authority of the AUSAs in this case to prosecute him. First, he argues that the United States Attorney's Office for the Eastern District of Missouri ("Eastern District USA") investigated and prosecuted him despite a conflict of interest. Specifically, *Sigillito* contends that the involvement of two attorneys who worked for the Eastern District USA during his investigation and prosecution prevented the district court from having jurisdiction to hear the case. *Sigillito* emphasizes that the Eastern District USA had previously recused itself from participating in his prosecution. Second, and relatedly, he contends that the Attorney General's appointment of the United States Attorney's Office for the Western District of Missouri ("Western District USA") as the special attorney assigned to handle his prosecution was ineffective in eliminating the conflict pursuant to 28 U.S.C. § 547. The government responds that we should review *Sigillito*'s interested-AUSA arguments for plain error because *Sigillito*

failed to object to the district court. Sigillito contends that we should conduct de novo review of these claims because an interested AUSA concerns the subject matter jurisdiction of the district court. We need not resolve the standard of review because Sigillito's arguments fail even under a de novo standard.

*Sigillito*, 759 F.3d at 927.

The Eighth Circuit then proceeded to analyze and decide the merits of two arguments made by Sigillito on appeal. First, the Circuit addressed the conflict of interest issue associated with having two EDMO prosecutors participate as Special Attorneys in the prosecution of him after the EDMO USAO was recused. Second, the Circuit addressed the authority of the WDMO USAO to prosecute the case against Sigillito in the Eastern District of Missouri. The Eighth Circuit resolved both issues on the merits, and expressly rejected Sigillito's claims that EDMO prosecutors could not participate in the prosecution of him and that the WDMO USAO could not prosecute him in the EDMO.

In resolving the first issue adversely to Sigillito, the Eighth Circuit said:

Sigillito has failed to demonstrate that [the conflicted EDMO AUSA] exercised any authority in the case that would call the fairness of the trial into question. [The conflicted EDMO AUSA] did not supervise the two Eastern District USA attorneys in this case or participate in Sigillito's prosecution. The two attorneys had no personal or financial interest at stake in the outcome of the prosecution. In other words, Sigillito has failed to demonstrate the presence of an actual conflict of interest.

*Sigillito*, 759 F.3d at 928.

Haning raises the exact same issue Sigillito raised, and the analysis in Sigillito is directly applicable here. Haning has not demonstrated that Jeff Jensen has exercised any authority in this case. In fact, Haning cannot make any such demonstration because Jeff Jensen has never exercised any authority in this case, and cannot ever do so by reason of the recusal. Jeff Jensen is not supervising, and by reason of the recusal cannot supervise, the work of the three EDMO

prosecutors who are working on this case as Special Attorneys under the supervision of the WDMO USAO. None of the EDMO prosecutors who are working on this case as Special Attorneys have any personal or financial interest at stake in the outcome of this prosecution. Here, as in *Sigillito*, Haning has failed to demonstrate the presence of an actual conflict of interest.

And as the Eighth Circuit noted in *Sigillito*, the only relevant conflict of interest is an actual conflict of interest. While noting that the presence of an interested prosecutor is “a fundamental error that undermines confidence in the integrity of the criminal proceeding,” the Eighth Circuit held that “courts may require a stronger showing of conflict for a prosecutor than a judge” and that **the defendant “must show that an actual conflict of interest is present”** before a prosecutor can be disqualified. *Sigillito*, 759 F.3d. at 928 (emphasis added).

The *Sigillito* case destroys Haning’s reliance on the appearance of a conflict of interest to justify disqualification. And the appearance of a conflict of interest is all Haning can muster in this case when he complains about the appearance of allowing EDMO prosecutors to work on this case. The *Sigillito* case is controlling precedent for establishing the rule that an actual conflict of interest is required, and because Haning cannot satisfy that rule, his argument fails.

Similarly, the *Sigillito* case is controlling on the issue of whether the WDMO USAO may prosecute this case in the EDMO under the auspices of a recusal with the use of Special Attorneys.

The language of the *Sigillito* case could not be more clear:

Federal law provides that “each United States attorney, within his district, shall . . . prosecute for all offenses against the United States.” 28 U.S.C. § 547. However, “[t]he Attorney General may appoint attorneys to assist United States attorneys when the public interest so requires.” 28 U.S.C. § 543. These “special attorneys” may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrate judges, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought. 28 U.S.C. § 515. *Sigillito* contends that the United States

Attorney (USA) from the Western District USAO had no authority to prosecute him because 28 U.S.C. § 547 requires that USAs prosecute crimes only within their district. While generally true, *Sigillito* ignores the statutes that allow the Attorney General to appoint special attorneys. Special attorneys may conduct any type of legal proceeding regardless of district of residence because of 28 U.S.C. § 515. As the Supreme Court has noted, specific statutes control over general statutes, regardless of the date of enactment. *Bulova Watch Co. v. United States*, 365 U.S. 753, 758, 81 S.Ct. 864, 6 L.Ed.2d 72 (1961). The more specific statute, which deals with special attorneys, allows for prosecution regardless of the special attorney's residency. Because the USA and AUSAs in the Western District USA were special attorneys in this case, they had the authority to prosecute *Sigillito* in the Eastern District USA. Thus, *Sigillito*'s argument on this point fails.

*Sigillito*, 759 F.3d at 928-29.

Once again, the *Sigillito* case destroys Haning's argument that Special Attorneys may not prosecute him. The Eighth Circuit's opinion in *Sigillito* is binding circuit precedent upholding the validity of the recusal structure put in place in this case. Based on *Sigillito*, this Court has binding circuit precedent that upholds the propriety of the recusal of the EDMO USAO in this case, and upholds the assignment of this case to the WDMO USAO using Special Attorneys under the supervision of the WDMO USAO, where none of the Special Attorneys has an actual conflict of interest, no matter whether they are located in EDMO or WDMO. And since all of this structure was in place months before the appointment of the Acting Attorney General, and was put in place under the auspices of Presidentially-nominated and Senate-confirmed United States Attorney General Jefferson B. Sessions, the Court can, and should, conclude that all of the dismissal and disqualification claims made in the defense motion are wholly without merit, and can do so summarily without any need for an evidentiary hearing.

WHEREFORE, and for the reasons stated herein, the Government respectfully requests that this Court deny Defendant's Motion to Dismiss (D.E. 88 and 72), deny Defendant's alternative request to disqualify lawfully appointed Special Attorneys from representing the United States in

this or any other related case (D.E. 88 and 72), and grant such other and further relief in favor of the United States as the Court finds just and proper in this case.

Respectfully submitted,

MATTHEW G. WHITAKER  
Acting United States Attorney General

TIMOTHY A. GARRISON  
United States Attorney  
Western District of Missouri

PHILLIP EUGENE PORTER  
Criminal Division Chief  
Western District of Missouri

/s/ Kathleen D. Mahoney  
KATHLEEN D. MAHONEY #38828MO  
Special Attorney to the Attorney General

#### **CERTIFICATE OF SERVICE**

I hereby certify that on December 11, 2018, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system upon all counsel of record.

/s/ Kathleen D. Mahoney  
Kathleen D. Mahoney #38828MO  
Special Attorney to the Attorney General

**Porter, Gene (USAMOW)**

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**From:** Pena, Jaime (USAEO)  
**Sent:** Thursday, November 02, 2017 12:44 PM  
**To:** Jensen, Jeff (USAMOE); Costantin, Carrie (USAMOE); Larson, Tom (USAMOW); Porter, Gene (USAMOW); Becker, Tiffany (USAMOE); Walsh, Cari (USAMOW); Livingston, Gary (USAMOE); Rodriguez, Christy (USAMOW)  
**Cc:** Schools, Scott (ODAG) (JMD); Wilkinson, Monty (USAEO); Bell, Suzanne L. (USAEO); Macklin, Jay (USAEO); Shea, Carol (USAEO)  
**Subject:** FORMAL NOTICE: Office-wide Recusal of the Eastern District of Missouri (REC-18-413)

**MEMORANDUM FOR:**

Jeffrey B. Jensen  
United States Attorney  
Eastern District of Missouri

Carrie Costantin  
First Assistant United States Attorney  
Eastern District of Missouri

Thomas Larson  
Acting United States Attorney  
Western District of Missouri

Gene Porter  
Criminal Chief  
Western District of Missouri

**THROUGH:** Scott Schools  
Associate Deputy Attorney General  
Office of the Deputy Attorney General

Jay Macklin  
General Counsel  
Executive Office for United States Attorneys

**FROM:** Jaime Pena  
Assistant United States Attorney  
Executive Office for United States Attorneys

**RE:** Office-Wide Recusal of the Eastern District of Missouri from the investigation and prosecution involving *United States v. Custom Ag. Commodities, et al.* and related matters  
(GCO File No. REC-18-413)

**THIS IS FORMAL NOTICE** that Scott Schools, Associate Deputy Attorney General (ADAG) has approved the recusal of the entire United States Attorney's Office for the Eastern District of Missouri from the case, including the investigation and prosecution, of *United States v. Custom Ag. Commodities, et al.* and related matters. The ADAG authorized this recusal in accordance with United States Attorneys' Manual (USAM) 3-2.170 and United States Attorneys' Procedures (USAP) 3-2.170.001 based upon existing conflicts of interest or the appearance of conflicts of interest pertaining to the matter.

ADAG Schools has assigned this matter to the Western District of Missouri and, pursuant to 28 U.S.C. § 515(a), has directed and authorized Acting United States Attorney Thomas Larson or his successor to conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before magistrate judges, which the United States Attorney for the Eastern District of Missouri is authorized by law to conduct regarding this matter, and related matters. *See* USAP 3-2.170.001(6)(C)(2)(b) The ADAG has authorized the following Assistant United States Attorneys and personnel from the Eastern District of Missouri to continue working on this matter under the direction of the Western District of Missouri:

AUSA Charles Birmingham  
 AUSA Gil Sison  
 Forfeiture AUSA Kyle Bateman  
 IT Specialist-Litigation Beau Toth  
 Legal Assistant Patricia Rockers  
 Legal Assistant Julie Hurst

Each office should communicate directly with the other concerning transfer of information related to this matter in accordance with the procedures outlined in USAP 3-2.170.001(6)(C)(2)(b)(3). The point of contact for the Western District of Missouri is Criminal Division Chief Gene Porter, who can be reached at (816) 426-3122, and the point of contact for the Eastern District of Missouri is First Assistant United States Attorney Carrie Costantin, who can be reached at (314) 539-2200.

All Assistant United States Attorneys subsequently assigned to this matter must be appointed as Special Attorneys in order to appear on behalf of the government in the Eastern District of Missouri. *See* USAM 3-2.300 and USAP 3-2.170.001(6)(C)(2)(b). Please contact Nicole West, EOUSA Personnel Staff, Operations Division, at (202) 252-5325, to obtain the appointment.

In accordance with USAP 3-2.170.001(6)(C)(2)(b)(3), any Special Attorney assigned the matter or case should sign any pleadings or documents using the signature block of the Western District of Missouri, with the addition of the Attorney General's name preceding that of the United States Attorney.

In the event that the Western District of Missouri wants to use AUSAs from the Eastern District of Missouri to assist it in this matter(s), it must submit a request to General Counsel's Office, EOUSA, that includes (1) a detailed justification of the need for the use of an AUSA, and (2) a detailed statement of the role the AUSA would play. ADAG Schools retains the authority to approve/disapprove any such request.

## Porter, Gene (USAMOW)

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**From:** Porter, Gene (USAMOW)  
**Sent:** Thursday, November 02, 2017 4:40 PM  
**To:** Larson, Tom (USAMOW); Ketchmark, David (USAMOW); Mahoney, Kate (USAMOW)  
**Cc:** Rodriguez, Christy (USAMOW); Wright, Sherri (USAMOW); Miles, Megan (USAMOW); Costantin, Carrie (USAMOE); Birmingham, Charles (USAMOE); Sison, Gilbert (USAMOE); Bateman, Kyle (USAMOE)  
**Subject:** FW: FORMAL NOTICE: Office-wide Recusal of the Eastern District of Missouri (REC-18-413)

Please see the notice below for a new recusal case assigned to WDMO.

WDMO will provide a supervisory chain of command so the three EDMO AUSAs listed below (Charles Birmingham, Gil Sison, and Kyle Bateman – who are excluded from the recusal that otherwise affects all other lawyers in the EDMO USAO) can continue to be the line prosecutors working this case. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Per the terms of the recusal notice, all three of the EDMO AUSAs need to be appointed as Special Attorneys in order to appear on behalf of the government in the Eastern District of Missouri. See USAM 3-2.300 and USAP 3-2.170.001(6)(C)(2)(b).

WDMO AUSA Kate Mahoney, the Chief of the Fraud and Public Corruption Unit in WDMO, will be the first line supervisor of the three EDMO line attorneys. Accordingly, she too needs to be appointed as a Special Attorney in the same manner as the three EDMO AUSAs.

Rosie – would you please contact Nicole West, EOUSA Personnel Staff, Operations Division, at (202) 252-5325, to obtain the appointments for all four AUSAs – WDMO AUSA Kate Mahoney as well as the three EDMO AUSAs.

[REDACTED]

[REDACTED]

Will keep Tom informed on all significant developments as they arise in the recusal case.

Let me know if you have any questions.

Gene

Gene Porter | Criminal Division Chief | United States Attorney's Office | Western District of Missouri | 400 East 9th St, Suite 5510, Kansas City, MO 64106 | ☎: (816) 426-3122 | 📠: (816) 426-4210 | ✉: [Gene.Porter@usdoj.gov](mailto:Gene.Porter@usdoj.gov)



U.S. Department of Justice

Executive Office for United States Attorneys

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NOV 14 2017

Human Resources Staff

U.S. DISTRICT COURT  
EASTERN DISTRICT OF MO  
ST. LOUIS

Suite 8017, Bicentennial Building  
600 E Street, NW  
Washington, DC 20530

(202) 252-5300  
FAX (202) 252-5301

November 14, 2017

Mr. Charles S. Birmingham  
Assistant United States Attorney  
Eastern District of Missouri  
Thomas F. Eagleton U.S. Courthouse  
111 South 10<sup>th</sup> Street, Room 20.333  
St. Louis, Missouri 63102

Dear Mr. Birmingham:

You are hereby appointed as a Special Attorney to the United States Attorney General pursuant to 28 U.S.C. § 515. Subject to the terms and conditions set forth below, you are authorized to file informations and to conduct in the Eastern District of Missouri any kind of legal proceedings, civil or criminal, including Grand Jury proceedings and proceedings before United States Magistrates which United States Attorneys are authorized to conduct.

This appointment is made subject to the following terms and conditions, with which we ask that you express your concurrence by signing this letter and returning it to me in the enclosed envelope:

1. This appointment is effective November 14, 2017, not to exceed November 13, 2019, unless extended;
2. With regard to all matters handled by you as a Special Attorney, you will report to and act under the direction of the United States Attorney General or his delegee, the United States Attorney for the Western District of Missouri.
3. During and after the term of your appointment, you will be subject to all laws, regulations and policies applicable to employees. These include, but are not limited to, the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635 et seq., Federal conflict of interest statutes 18 U.S.C. §§ 207, 208, and 209; laws restricting the disclosure of certain confidential governmental information, 18 U.S.C. § 1905 and the Freedom of Information and Privacy Acts, 5 U.S.C. § 552 and § 522a; and political activity restrictions, 5 U.S.C. § 7321 et seq.;

4. You will serve without compensation other than that which you now receive as an employee of the Department of Justice; and

5. Your appointment may be terminated at any time without cause or notice.

Please execute the enclosed Appointment Affidavit which contains the oath of office and return it to Nicole West, SAUSA Program Assistant, Operations Division within fourteen (14) days. This appointment is effective upon the execution of the required oath of office.


You must file a copy of this letter with the Clerk of the District Court to evidence this appointment.

Sincerely,



Valarie D. Mulcahy  
Assistant Director  
Human Resources Staff  
Operations Division

The foregoing terms and conditions  
are hereby agreed to and accepted:



Charles S. Birmingham

# APPOINTMENT AFFIDAVITS

SPECIAL ATTORNEY

(Position to which Appointed)

NOVEMBER 14, 2017

(Date Appointed)

DOJ

(Department or Agency)

WDMO

(Bureau or Division)

STL, MO

(Place of Employment)

I, CHARLES S. BIRMINGHAM, do solemnly swear (or affirm) that--

## A. OATH OF OFFICE

I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

## B. AFFIDAVIT AS TO STRIKING AGAINST THE FEDERAL GOVERNMENT

I am not participating in any strike against the Government of the United States or any agency thereof, and I will not so participate while an employee of the Government of the United States or any agency thereof.

## C. AFFIDAVIT AS TO THE PURCHASE AND SALE OF OFFICE

I have not, nor has anyone acting in my behalf, given, transferred, promised or paid any consideration for or in expectation or hope of receiving assistance in securing this appointment.

(Signature of Appointee)

Subscribed and sworn (or affirmed) before me this 14<sup>th</sup> day of November, 2017

at St. Louis  
(City)

Missouri  
(State)



JULIA MARIE HURST  
My Commission Expires  
May 18, 2021  
St. Louis City  
Commission #13690947

Commission expires 5-15-2021  
(If by a Notary Public, the date of his/her Commission should be shown)

(Signature of Officer)


(Title)

Note - If the appointee objects to the form of the oath on religious grounds, certain modifications may be permitted pursuant to the Religious Freedom Restoration Act. Please contact your agency's legal counsel for advice.

**STATEMENT OF APPOINTMENT CONDITIONS**

I, CHARLES S. BIRMINGHAM, hereby agree to the following as a condition to my appointment pursuant to 28 U.S.C. section 515 as a Special Attorney for the District of WDMO to assist with: US v. Customs Ag Commodities, et al and will report and act under the direction of the US AG or his delegee, the USA for the WDMO.

1. If I require access to restricted information involving a matter other than that to which I have been appointed, I shall request authorization from the United States Attorney.
2. I agree to sign a Grand Jury confidentiality statement, as appropriate.

Signature: 

Date: November 14, 2017



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NOV 16 2017

U.S. DISTRICT COURT  
EASTERN DISTRICT OF MO  
ST. LOUIS

Human Resources Staff

U.S. Department of Justice

Executive Office for United States Attorneys

Suite 8017, Bicentennial Building  
600 E Street, NW  
Washington, DC 20530

(202) 252-5300  
FAX (202) 252-5301

November 15, 2017

Mr. Gilbert C. Sison  
Assistant United States Attorney  
Eastern District of Missouri  
Thomas F. Eagleton U.S. Courthouse  
111 South 10<sup>th</sup> Street, Room 20.333  
St. Louis, Missouri 63102

Dear Mr. Sison:

You are hereby appointed as a Special Attorney to the United States Attorney General pursuant to 28 U.S.C. § 515. Subject to the terms and conditions set forth below, you are authorized to file informations and to conduct in the Eastern District of Missouri any kind of legal proceedings, civil or criminal, including Grand Jury proceedings and proceedings before United States Magistrates which United States Attorneys are authorized to conduct.

This appointment is made subject to the following terms and conditions, with which we ask that you express your concurrence by signing this letter and returning it to me in the enclosed envelope:

1. This appointment is effective November 15, 2017, not to exceed November 14, 2019, unless extended;
2. With regard to all matters handled by you as a Special Attorney, you will report to and act under the direction of the United States Attorney General or his delegee, the United States Attorney for the Western District of Missouri.
3. During and after the term of your appointment, you will be subject to all laws, regulations and policies applicable to employees. These include, but are not limited to, the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635 et seq., Federal conflict of interest statutes 18 U.S.C. §§ 207, 208, and 209; laws restricting the disclosure of certain confidential governmental information, 18 U.S.C. § 1905 and the Freedom of Information and Privacy Acts, 5 U.S.C. § 552 and § 522a; and political activity restrictions, 5 U.S.C. § 7321 et seq.;

4. You will serve without compensation other than that which you now receive as an employee of the Department of Justice; and
5. Your appointment may be terminated at any time without cause or notice.

Please execute the enclosed Appointment Affidavit which contains the oath of office and return it to Nicole West, SAUSA Program Assistant, Operations Division within fourteen (14) days. This appointment is effective upon the execution of the required oath of office.

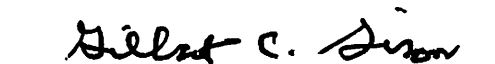
You must file a copy of this letter with the Clerk of the District Court to evidence this appointment.

Sincerely,



Valarie D. Mulcahy  
Assistant Director  
Human Resources Staff  
Operations Division

The foregoing terms and conditions  
are hereby agreed to and accepted:

  
Gilbert C. Sison

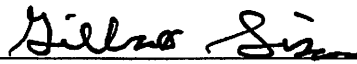
STATEMENT OF APPOINTMENT CONDITIONS

I, Gilbert Sison, hereby agree to the following as a condition to my appointment pursuant to 28 U.S.C. section 543 as a Special Assistant United States Attorney for the Western District of Missouri to assist with:

US. V. Customs Commodities, et al and will report and act under direction  
of the US AG or his delegee, the USA for the WDMO.

1. If I require access to restricted information involving a matter other than that to which I have been appointed, I shall request authorization from the United States Attorney.
2. I understand that the limitations of my access to the United States Attorney's Office is determined by the United States Attorney in that office.

Signature:

  
Gilbert Sison

Date:

November 16, 2017

# APPOINTMENT AFFIDAVITS

Special Attorney  
(Position to which Appointed)

11/15/2017  
(Date Appointed)

Department of Justice  
(Department or Agency)

USAO - WDMO  
(Bureau or Division)

St. Louis, Missouri  
(Place of Employment)

I, Gilbert Sison, do solemnly swear (or affirm) that--

## A. OATH OF OFFICE

I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

## B. AFFIDAVIT AS TO STRIKING AGAINST THE FEDERAL GOVERNMENT

I am not participating in any strike against the Government of the United States or any agency thereof, and I will not so participate while an employee of the Government of the United States or any agency thereof.

## C. AFFIDAVIT AS TO THE PURCHASE AND SALE OF OFFICE

I have not, nor has anyone acting in my behalf, given, transferred, promised or paid any consideration for or in expectation or hope of receiving assistance in securing this appointment.

Gilbert Sison  
(Signature of Appointee)

Subscribed and sworn (or affirmed) before me this 16th day of November, 2017

at St. Louis  
(City)

Missouri  
(State)



JULIA MARIE HURST  
My Commission Expires  
May 18, 2021  
St. Louis City  
Commission #13690947

Julia Marie Hurst  
(Signature of Officer)

Commission expires 5-18-2021  
(If by a Notary Public, the date of his/her Commission should be shown)

Notary Public  
(Title)

Note - If the appointee objects to the form of the oath on religious grounds, certain modifications may be permitted pursuant to the Religious Freedom Restoration Act. Please contact your agency's legal counsel for advice.



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U.S. DISTRICT COURT  
EASTERN DISTRICT OF MO  
ST. LOUIS

U.S. Department of Justice

Executive Office for United States Attorneys

Human Resources Staff

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600 E Street, NW  
Washington, DC 20530

(202) 252-5300  
FAX (202) 252-5301

November 15, 2017

Mr. Kyle T. Bateman  
Assistant United States Attorney  
Eastern District of Missouri  
Thomas F. Eagleton U.S. Courthouse  
111 South 10<sup>th</sup> Street, Room 20.333  
St. Louis, Missouri 63102

Dear Mr. Bateman:

You are hereby appointed as a Special Attorney to the United States Attorney General pursuant to 28 U.S.C. § 515. Subject to the terms and conditions set forth below, you are authorized to file informations and to conduct in the Eastern District of Missouri any kind of legal proceedings, civil or criminal, including Grand Jury proceedings and proceedings before United States Magistrates which United States Attorneys are authorized to conduct.

This appointment is made subject to the following terms and conditions, with which we ask that you express your concurrence by signing this letter and returning it to me in the enclosed envelope:

1. This appointment is effective November 15, 2017, not to exceed November 14, 2019, unless extended;
2. With regard to all matters handled by you as a Special Attorney, you will report to and act under the direction of the United States Attorney General or his delegate, the United States Attorney for the Western District of Missouri.
3. During and after the term of your appointment, you will be subject to all laws, regulations and policies applicable to employees. These include, but are not limited to, the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635 et seq., Federal conflict of interest statutes 18 U.S.C. §§ 207, 208, and 209; laws restricting the disclosure of certain confidential governmental information, 18 U.S.C. § 1905 and the Freedom of Information and Privacy Acts, 5 U.S.C. § 552 and § 522a; and political activity restrictions, 5 U.S.C. § 7321 et seq.;

Attachment 4

4. You will serve without compensation other than that which you now receive as an employee of the Department of Justice; and
5. Your appointment may be terminated at any time without cause or notice.

Please execute the enclosed Appointment Affidavit which contains the oath of office and return it to Nicole West, SAUSA Program Assistant, Operations Division within fourteen (14) days. This appointment is effective upon the execution of the required oath of office.

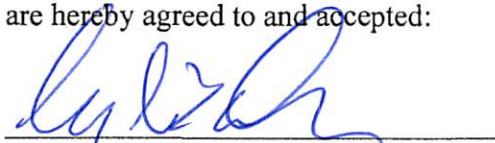
You must file a copy of this letter with the Clerk of the District Court to evidence this appointment.

Sincerely,



Valarie D. Mulcahy  
Assistant Director  
Human Resources Staff  
Operations Division

The foregoing terms and conditions  
are hereby agreed to and accepted:

  
\_\_\_\_\_  
Kyle T. Bateman

# APPOINTMENT AFFIDAVITS

Special Attorney  
(Position to which Appointed)

11/15/2017  
(Date Appointed)

Department of Justice  
(Department or Agency)

USAO - WDMO  
(Bureau or Division)

St. Louis, Missouri  
(Place of Employment)

I, Kyle Bateman, do solemnly swear (or affirm) that--

## A. OATH OF OFFICE

I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

## B. AFFIDAVIT AS TO STRIKING AGAINST THE FEDERAL GOVERNMENT

I am not participating in any strike against the Government of the United States or any agency thereof, and I will not so participate while an employee of the Government of the United States or any agency thereof.

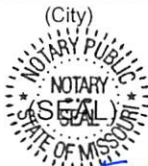
## C. AFFIDAVIT AS TO THE PURCHASE AND SALE OF OFFICE

I have not, nor has anyone acting in my behalf, given, transferred, promised or paid any consideration for or in expectation or hope of receiving assistance in securing this appointment.

  
(Signature of Appointee)

Subscribed and sworn (or affirmed) before me this 16th day of November, 2017

at St. Louis Missouri  
(City) (State)



JULIA MARIE HURST  
My Commission Expires  
May 18, 2021  
St. Louis City  
Commission #13690947

  
(Signature of Officer)

Commission expires 5-18-2021  
(If by a Notary Public, the date of his/her Commission should be shown)

Notary Public  
(Title)

Note - If the appointee objects to the form of the oath on religious grounds, certain modifications may be permitted pursuant to the Religious Freedom Restoration Act. Please contact your agency's legal counsel for advice.

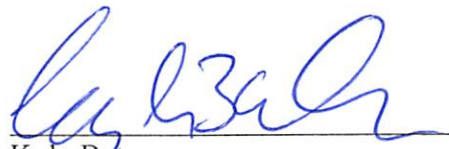
STATEMENT OF APPOINTMENT CONDITIONS

I, Kyle Bateman, hereby agree to the following as a condition to my appointment pursuant to 28 U.S.C. section 543 as a Special Assistant United States Attorney for the Western District of Missouri to assist with:

US. V. Customs Commodities, et al and will report and act under direction of the US AG or his delegee, the USA for the WDMO.

1. If I require access to restricted information involving a matter other than that to which I have been appointed, I shall request authorization from the United States Attorney.
2. I understand that the limitations of my access to the United States Attorney's Office is determined by the United States Attorney in that office.

Signature:

  
Kyle Bateman

Date:

November 16, 2017



**U.S. Department of Justice**

Executive Office for United States Attorneys

Human Resources Staff

*Suite 8017, Bicentennial Building  
600 E Street, NW  
Washington, DC 20530*

*(202) 252-5300  
FAX (202) 252-5301*

November 14, 2017

Ms. Kathleen D. Mahoney  
Assistant United States Attorney  
Western District of Missouri  
Charles E. Whittaker Courthouse  
400 East 9<sup>th</sup> Street  
Kansas City, Missouri 64106

Dear Ms. Mahoney:

You are hereby appointed as a Special Attorney to the United States Attorney General pursuant to 28 U.S.C. § 515. Subject to the terms and conditions set forth below, you are authorized to file informations and to conduct in the Eastern District of Missouri any kind of legal proceedings, civil or criminal, including Grand Jury proceedings and proceedings before United States Magistrates which United States Attorneys are authorized to conduct

This appointment is made subject to the following terms and conditions, with which we ask that you express your concurrence by signing this letter and returning it to me in the enclosed envelope:

1. This appointment is effective November 14, 2017, not to exceed November 13, 2019, unless extended;
2. With regard to all matters handled by you as a Special Attorney, you will report to and act under the direction of the United States Attorney General or his delegee, the United States Attorney for the Western District of Missouri;
3. During and after the term of your appointment, you will be subject to all laws, regulations and policies applicable to employees. These include, but are not limited to, the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635 et seq., Federal conflict of interest statutes 18 U.S.C. §§ 207, 208, and 209; laws restricting the disclosure of certain confidential governmental information, 18 U.S.C. § 1905 and the Freedom of Information and Privacy Acts, 5 U.S.C. § 552 and § 522a; and political activity restrictions, 5 U.S.C. § 7321 et seq.;

4. You will serve without compensation other than that which you now receive as an employee of the Department of Justice; and
5. Your appointment may be terminated at any time without cause or notice.

Please execute the enclosed Appointment Affidavit which contains the oath of office and return it to Nicole West, SAUSA Program Assistant, Operations Division within fourteen (14) days. This appointment is effective upon the execution of the required oath of office.

You must file a copy of this letter with the Clerk of the District Court to evidence this appointment.

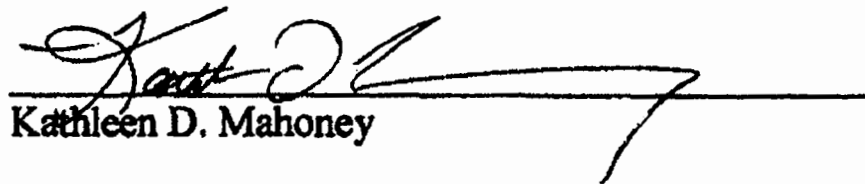
Sincerely,



Valarie D. Mulcahy  
Assistant Director  
Human Resources Staff  
Operations Division

Enclosure

The foregoing terms and conditions  
are hereby agreed to and accepted:

  
Kathleen D. Mahoney

# APPOINTMENT AFFIDAVITS

Special Attorney

(Position to which Appointed)

11/14/2017

(Date Appointed)

Department of Justice

(Department or Agency)

U. S. Attorney's Office

(Bureau or Division)

Eastern District of Missouri

(Place of Employment)

I, Kathleen D. Mahoney, do solemnly swear (or affirm) that--

## A. OATH OF OFFICE

I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

## B. AFFIDAVIT AS TO STRIKING AGAINST THE FEDERAL GOVERNMENT

I am not participating in any strike against the Government of the United States or any agency thereof, and I will not so participate while an employee of the Government of the United States or any agency thereof.

## C. AFFIDAVIT AS TO THE PURCHASE AND SALE OF OFFICE

I have not, nor has anyone acting in my behalf, given, transferred, promised or paid any consideration for or in expectation or hope of receiving assistance in securing this appointment.

  
(Signature of Appointee)

Subscribed and sworn (or affirmed) before me this 14 day of November, 2017

at Kansas City

Missouri

(State)

JEANNE MORGAN (City)  
Notary Public - Notary Seal  
State of Missouri  
Commissioned for Clay County  
My Commission Expires: June 11, 2018  
Commission Number: 14982535

  
(Signature of Officer)

Commission expires June 11, 2018

(If by a Notary Public, the date of his/her Commission should be shown)

Acting United States Attorney  
(Title)

Note - If the appointee objects to the form of the oath on religious grounds, certain modifications may be permitted pursuant to the Religious Freedom Restoration Act. Please contact your agency's legal counsel for advice.

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 VS. ) No. 4:17-CR-100 (NAB)  
 )  
 HENRY R. RYCHLIK, WILBUR-ELLIS )  
 COMPANY, COLLIN McATEE AND )  
 DIVERSIFIED INGREDIENTS, INC., )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

STATUS CONFERENCE AND MOTION HEARING  
BEFORE THE HONORABLE NANNETTE A. BAKER  
December 7, 2017  
ST. LOUIS, MISSOURI

FOR THE PLAINTIFF:

CHARLES S. BIRMINGHAM  
GILBERT C. SISON  
OFFICE OF U.S. ATTORNEY  
111 South Tenth Street, Suite 2000  
St. Louis, MO 63102  
(314) 539-2200

FOR THE DEFENDANTS:

CHRISTOPHER A. SLUSHER  
HOLDER & SUSAN  
107 N. Seventh Street, Suite 200  
Columbia, MO 65201  
(573) 499-1700  
(Henry R. Rychlik)

WILLIAM D. SPRAGUE (via phone)  
COVINGTON & BURLING, LLP  
One Front Street  
San Francisco, CA 94111  
(415) 591-7097

(Wilbur-Ellis Company)  
GORDON L. ANKNEY  
JAN MILLER

THOMPSON COBURN, LLP  
One USBank Plaza  
505 N. Seventh Street  
St. Louis, MO 63101  
(314) 552-6003  
(Diversified Ingredients, Inc.)

Proceedings recorded by mechanical stenography;  
transcript produced by computer.

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DEBORAH A. KRIEGSHAUSER, FAPR, RMR, CRR  
Federal Official Court Reporter  
111 South Tenth Street, Third Floor  
St. Louis, MO 63102  
(314) 244-7449

1 (PROCEEDINGS BEGAN AT 10:00 AM.)

2 THE CLERK: All rise. This Honorable Court is now in  
3 session. Please be seated.

4 THE COURT: Good morning. We are on the record now  
5 in the matter of *United States of America versus Henry*  
6 *Rychlik, Wilbur-Ellis, Collin McAtee and Diversified*  
7 *Ingredients.*

8 And just as a start, Mr. D'Agrosa contacted our  
9 chambers and stated that he would not be attending today's  
10 status conference and did not have a -- a need to attend.

11 And I believe we have -- we have someone on the  
12 phone. Is it Mister --

13 MR. SPRAGUE: Yes. Good morning, Your Honor. This  
14 is Doug Sprague, and I am -- I represent Wilbur-Ellis.

15 THE COURT: All right. So, otherwise, who do we have  
16 here for Mister -- Is it "Rychlik"?

17 MR. SLUSHER: Yes. It's "Rychlik," Judge.

18 THE COURT: Rychlik.

19 MR. SLUSHER: Chris Slusher.

20 THE COURT: All right, Mr. Slusher.

21 And then we have Mr. Ankney here for Diversified  
22 Ingredients.

23 Is there anyone else who needs to announce their  
24 presence?

25 MR. ANKNEY: Jan Miller is here who's my partner,

1 also, Your Honor.

2 THE COURT: All right.

3 MR. MILLER: Good morning, Your Honor.

4 THE COURT: Good morning.

5 And for the United States, we have Mr. Birmingham and  
6 we also have Mr. Sison.

7 I'd like to start -- So I had set this status  
8 hearing. And just as an aside, I had been contacted by  
9 Mr. Birmingham.

10 Mr. Birmingham, you contacted me a couple of days  
11 ago, I think, to ask for a resetting of the status hearing.  
12 And if you could just go through that so that we can make a  
13 record regarding everything that happened and why we are here  
14 today.

15 MR. BIRMINGHAM: Certainly, Your Honor.

16 The specifics of that phone call, I'll maybe start  
17 with there. There was a recusal issue that was presented  
18 previous to the last status conference. It was moved at the  
19 Government's request but -- so the Government would have an  
20 opportunity to resolve that conflict. We -- Since that time I  
21 believe we've resolved that conflict.

22 I was contacted on Friday by Judge Sippel in  
23 reference to the civil case that had a status conference with  
24 some of the same parties and suggesting that that status  
25 conference be moved, and that was moved.

1 I contacted -- I had conversations with  
2 Chris Slusher, attorney for Mr. Rychlik, as well as  
3 Doug Sprague, attorney for Wilbur-Ellis, regarding the  
4 productivity of a status conference at this time given the  
5 appointment of the Western District of Missouri.

6 And I contacted chambers (1) to announce or seek a  
7 possible Change of Plea date as to Wilbur-Ellis and, as the  
8 explanation went forward with the Court's clerk, I thought it  
9 was better to just talk to the Court directly with the idea  
10 that it seemed to make sense for all the parties, based on  
11 prior conversations, to move the status conference to a date  
12 that was consistent with Judge Sippel's setting in the civil  
13 case.

14 I had not spoken with Mr. Ankney or Mr. D'Agrosa at  
15 that time regarding the possibility of moving the conference.  
16 After I spoke with the Court, I left voicemail messages for  
17 both Mr. Ankney and Mr. D'Agrosa and invited them to contact  
18 me if that was an issue.

19 The Court moved that -- that date, and then there was  
20 a motion or objection filed as to the Entry of Appearance.  
21 And briefly, Your Honor, if I may just make a record on that,  
22 and then we can take the matter up.

23 Like I said, the -- the Government recognized the  
24 conflict when Jeff Jensen was appointed U.S. Attorney for the  
25 Eastern District of Missouri and asked both in the civil case

1 and in the criminal case for an opportunity to appropriately  
2 resolve that conflict before there were any other proceedings  
3 in either matter.

4 On November 2nd, after our office (the Eastern  
5 District of Missouri )notified the Department of Justice and  
6 the Office of General Counsel of the conflict, there were  
7 certain discussions, and it resulted in a Notice of Recusal  
8 for the Eastern District of Missouri that we received on  
9 November the 2nd. The Associate Deputy Attorney General  
10 approved the recusal of the United States Office of the  
11 Eastern District of Missouri for the case based on that  
12 existing conflict as to Jeff Jensen as the United States  
13 Attorney. And just for the record, he had entered essentially  
14 as local counsel here on this matter on behalf of  
15 Wilbur-Ellis.

16 In recusing the Eastern District of Missouri, the  
17 Deputy -- Associate Deputy Attorney General specifically  
18 authorized and directed certain appointments. First, as the  
19 -- the case or the matter was assigned to the Western District  
20 of Missouri and has directed and authorized the Acting  
21 United States Attorney, Tom Larson, to conduct any of the  
22 proceedings in the matter and the United States Attorney for  
23 the Eastern District of Missouri that the United States  
24 Attorney for the Eastern District of Missouri could do.

25 The Associate Deputy Attorney General also authorized

1 specifically Assistant United States Attorneys, myself and  
2 Gil Sison, to continue working under -- working on the matter  
3 under the direction of the Western District of Missouri. That  
4 notice and that appointment and those procedures also directed  
5 that -- that -- that any Assistant United States Attorney  
6 subsequently assigned, me -- myself and Gil Sison, to the  
7 matter be appointed as Special Attorneys to -- in order to  
8 appear on behalf of the Government in the Eastern District of  
9 Missouri and that those appointments then -- we sought out  
10 those appointments over the next week or two in reference to  
11 the matter.

12 As Special Attorney assigned in the matter as  
13 reflected in our entry that we filed, those pleadings and  
14 documents filed in the case, we were directed to use the  
15 signature block of the Western District of Missouri with the  
16 addition of the Attorney General's name preceding that for the  
17 United States Attorney. So that -- that all happened on  
18 November 2nd.

19 November 8th, the Criminal Chief for the Western  
20 District of Missouri provided myself and Gil Sison a checklist  
21 for prior supervisory review and approval requirements, and  
22 those prior supervisory review and approval requirements for  
23 the Western District included all charging decisions, all plea  
24 agreements, 5K motions, sentencing recommendations and so  
25 forth. In other words, all -- the Western District was going

1 to review and approve all -- all those case developments. We  
2 were provided that checklist, and then we were provided with  
3 the appointment letter that was attached to the Government's  
4 response to the objection to the Entry of Appearance. That  
5 Special Attorney appointment to the United States Attorney  
6 General was subject to the terms of the conditions that both  
7 Mr. Sison and myself were required to agree to. Specifically,  
8 they included, with regard to all matters handled by myself  
9 and Mr. Sison as Special Attorney, we will report to and act  
10 under the direction of the United States Attorney General or  
11 as designee of the United States Attorney for the Western  
12 District of Missouri. And the Court has both our signed  
13 appointment letters affirming that those terms and conditions  
14 are agreeable.

15 We entered our appearance as directed. The style of  
16 the appearance is as set forth in the notice.

17 "Specifically comes now Tom Larson, Acting  
18 United States Attorney for the Western District of Missouri,  
19 and Charles S. Birmingham and Gilbert C. Sison, Assistant  
20 United States Attorneys for said district, and hereby enter  
21 their appearances on behalf of the United States."

22 And then the designee being Jefferson Sessions,  
23 United States Attorney General as well as Tom Larson.

24 Those -- Those are the proceedings that the  
25 Government undertook from the time that we asked that the

1 status conference previously set proceed up until this point.  
2 So, obviously, the Western District is getting up to speed on  
3 the case. Any plea agreements, any new charges, so forth,  
4 would be subject to their review, their supervision. We're  
5 acting under their direction and under their authority.

6 So my hope is by clarifying those procedures, those  
7 requirements, that the objection that was filed, based on that  
8 additional information, we wanted to afford Diversified an  
9 opportunity to withdraw that objection, given the procedures  
10 that the Government's taken to address the actual conflict and  
11 any appearance of conflict, and we're ready to provide  
12 additional status as to how we think the case is proceeding  
13 thereafter. But maybe it's more appropriate to see where we  
14 stand on the objection.

15 THE COURT: All right. Thank you, Mr. Birmingham.

16 MR. BIRMINGHAM: Thank you.

17 THE COURT: Mr. Ankney, you filed the objection to  
18 the Entry of Appearance.

19 MR. BIRMINGHAM: It was Mr. Ankney for Diversified,  
20 Your Honor.

21 THE COURT: Yes, for Diversified, yes; yes.

22 MR. ANKNEY: Good morning, Your Honor.

23 THE COURT: And just for the record, we do not have  
24 an objection from Mr. McAtee. And is there any objection from  
25 Mr. Rychlik?

1 MR. SLUSHER: No, Your Honor.

2 THE COURT: From Wilbur-Ellis Company?

3 MR. SPRAGUE: No objection, Your Honor.

4 THE COURT: All right. All right. You may proceed,  
5 Mr. Ankney.

6 MR. ANKNEY: Your Honor, as much as I'd like to  
7 short-circuit this, I don't believe I can withdraw my  
8 objection. I think this is an unusual circumstance. You  
9 know, the background is -- is that Jeff Jensen, who is now the  
10 United States Attorney, was -- previously represented  
11 Wilbur-Ellis who is a defendant in this matter, but he also  
12 for a period of time represented several employees of  
13 Wilbur-Ellis who are under investigation. And as your -- As  
14 Your Honor will recall, the Government has announced that at  
15 some point there will be an indictment that would include my  
16 client, Diversified Ingredients, as a misdemeanor, but there  
17 would be felony charges which we believe would be those  
18 individuals or could be those individuals that Mr. Jensen  
19 represented. So clearly, representing Wilbur-Ellis and the  
20 individuals who -- employees of Wilbur-Ellis, they are adverse  
21 to my client. That's -- That's a significant issue in this  
22 case is that they are adverse to us.

23 After Mr. Jensen became the U.S. Attorney, as we just  
24 learned, then the entire office of the Eastern District was  
25 recused. They didn't recuse just Mr. Jensen. They recused

1 the office. And the Department of Justice did that, and they  
2 did that for some reason. And it's clear that they recognize  
3 there was a conflict, and the conflict goes farther than  
4 Mr. Jensen.

5           There's a third attorney that was mentioned. He  
6 wasn't mentioned today, but I've seen him in the documents.  
7 It's not just Mr. Sison and Mr. Birmingham. There's a third  
8 attorney that's also mentioned as being carved out, but these  
9 three attorneys all are assigned -- still assigned to the  
10 Eastern District of Missouri. They all draw their salaries  
11 from the Eastern District of Missouri. They all office in the  
12 Eastern District of Missouri. They handle cases -- other  
13 cases in the Eastern District of Missouri. They report to  
14 supervisors in the Eastern District of Missouri who have been  
15 recused from this case. They report to Jeff Jensen, and  
16 Jeff Jensen is the person who would determine whether they get  
17 raises or promotions.

18           I don't understand how some can have a conflict and  
19 some not. It would seem to me that if the whole entire office  
20 was recused, which we've understood, you can't just carve  
21 people out. If you could just carve people out by appointing  
22 them Special Attorneys, they could appoint Jeff Jensen as a  
23 Special Attorney and -- and somehow waive the conflict.

24           I've looked at the statute they cite for Special  
25 Attorney, and I agree. They can appoint a Special Attorney to

1 conduct any type of legal proceeding, but there's nothing in  
2 that statute that allows them to waive a conflict. If the  
3 office has a conflict, it has a conflict.

4           You know, the bottom line of this is: My client's  
5 existence is at issue in this case. They could be put out of  
6 business if they're convicted of this crime. They look at the  
7 prosecutors in this case who -- who owe allegiance to  
8 Jeff Jensen and other supervisors in this case. They  
9 certainly perceive that there's a conflict of interest here.  
10 And if there's an actual conflict of interest, there's  
11 certainly an appearance of conflict of interest, and that's a  
12 problem in the administration of justice in this case.

13           Thank you, Your Honor.

14           THE COURT: All right. Thank you.

15           Is there a response from the Government?

16           MR. BIRMINGHAM: Briefly, Your Honor.

17           Obviously, there's a conflict. That's why we took  
18 the steps that the Government took. Obviously, the Plaintiff  
19 in this case is the United States of America. The charge in  
20 this case occurred in March of 2017. The -- And that would  
21 have been when it was Acting U.S. Attorney Carrie Costantin.

22           The conflict and the appearance of conflict is based  
23 upon a reasonableness standard. In other words, what would a  
24 reasonable person view as a conflict or the appearance of  
25 conflict. I believe the procedures put in place where the

1 line AUSAs who are familiar with the facts of the case are  
2 reporting to and under the supervision of the Western District  
3 of Missouri as to charging decisions and as to plea agreements  
4 and so forth and ultimately under -- acting under the  
5 authority of the Attorney General, the Western District is the  
6 Attorney General's designee in this regard. I believe those  
7 -- what has been put in place more than sufficiently addresses  
8 the actual conflict and certainly the appearance of any  
9 conflict. There's no suggestion that either Mr. Sison or  
10 myself have an actual conflict in the -- in the case based on  
11 any relationship with Diversified. The mechanism that was put  
12 in place as to Mr. Jensen's conflict or the U.S. Attorney's  
13 conflict, it seems to me their argument is because we went  
14 above and beyond, simply just walling off Jeff Jensen and  
15 deciding to put the whole case within the Western District and  
16 put Mr. Sison and myself under their supervision, that somehow  
17 warrants disqualification of the line AUSAs who are in the  
18 case. It's the exact opposite, Your Honor. The Government's  
19 gone above and beyond not only addressing the actual conflict  
20 but the appearance of conflict. In other words, everything  
21 that's going to proceed in this case is going to happen under  
22 the authorization and direction of the Western District and  
23 the criminal supervisors in that office.

24 THE COURT: So it seems that the concern set forth by  
25 Diversified is that even though you'll be acting under the

1 direction of the Western District for this case, you are still  
2 employees, if you will, of the Eastern District of Missouri.  
3 And if the Eastern District of Missouri has been conflicted  
4 out of the case, that there may be, I guess, some influence  
5 because you're being paid by the Eastern District. You're  
6 still being supervised on other cases by Mr. Jensen or other  
7 supervisors in the office. That appears to be the argument  
8 that they have.

9 MR. BIRMINGHAM: I think -- A couple of points,  
10 Your Honor. A similar issue was addressed in the last few  
11 years in the matter of Mr. Sigillito --

12 THE COURT: That's what I was thinking, that we have  
13 been through this before.

14 MR. BIRMINGHAM: -- in that Steve Holtshouser was the  
15 Lead AUSA, and there was a conflict both as to the office  
16 based on a victim and a relationship but there was also within  
17 the Court --

18 THE COURT: The Court, yeah.

19 MR. BIRMINGHAM: -- as well, and that the -- the same  
20 remedy or the same manner of addressing the conflict and  
21 appearance of conflict that the Government's taken in this  
22 case is what was taken --

23 THE COURT: Okay.

24 MR. BIRMINGHAM: -- what was done in Mr. Sigillito's  
25 case where Mr. Holtshouser entered as a Special Attorney. He

1 was under the supervision and direction of the Western  
2 District. Pleas that occurred in that case were approved by  
3 the Western District, and sentencing recommendations were also  
4 approved and directed out of the Western District. So this is  
5 -- this is not an extraordinary path that we're taking. It's  
6 consistent with what the U.S. Attorney's Office has done in  
7 the past and has been approved by the Court as a reasonable  
8 approach to addressing a conflict such as this.

9 THE COURT: All right. I was wondering whether we  
10 had any guidance out there for the situation. I have to  
11 believe that this isn't the first time that this has  
12 happened --

13 MR. BIRMINGHAM: I think ---

14 THE COURT: -- anywhere else in the country for that  
15 matter.

16 MR. BIRMINGHAM: Yeah. I think -- Well, I mean -- In  
17 other words, there's -- I haven't looked at each and every  
18 manual and policy reference, but that the -- there is a  
19 methodology.

20 THE COURT: Okay.

21 MR. BIRMINGHAM: In other words, it is -- If the U.S.  
22 Attorney's Office -- U.S. Attorney is conflicted, you look at  
23 it: Is it simply (1) a matter that should be addressed by  
24 walling off or is it more appropriate to recuse the office?

25 In a case, especially a complex case, is -- it is --

1 and I believe that was what was occurring in *Sigillito* where  
2 you had line prosecutors that had invested time on the facts  
3 and the legal issues of the case. As long as they are subject  
4 to the supervision of the Western District, it is appropriate  
5 to carve out certain individuals to continue to work on the  
6 case but under different supervisors and under a different  
7 U.S. Attorney. So in this instance, Mr. Larson out of the  
8 Western District, and then we have a Criminal Chief out of the  
9 Western District and then a White Collar supervisor who are  
10 all working with Mr. Sison and myself and approving anything  
11 that we do as it relates to charges, new charges, plea  
12 agreements and so forth.

13 THE COURT: All right. Yes.

14 MR. ANKNEY: Your Honor, I'm certain there are  
15 procedures that they have set down for certain types of  
16 recusals in general, but I have to say that, you know, they  
17 could have just recused Mr. Jensen and walled him off. They  
18 made a decision to recuse the office, and there had to be a  
19 reason to do that.

20 I'm not familiar with the facts of the case that's  
21 been cited here, but I would bet it's not similar to ours in  
22 that the recusal in this case was of "the" U.S. Attorney  
23 because he directly represented people who were adverse to  
24 other individuals who are charged. I mean it's a serious  
25 issue for defendants charged in the case if their existence is

1 at issue. And to have people who -- who report to the  
2 United States Attorney, not just a line attorney or such,  
3 that's a different circumstance than a United States Attorney  
4 who is adverse to -- to certain defendants, and certainly the  
5 Defendants perceive this as the potential for a -- a conflict.

6 THE COURT: If -- With regard to this case, if, as  
7 they have stated, everything is being supervised by the  
8 Western District, any decisions going forward in this case are  
9 all being supervised by the Western District. What impact do  
10 you think Mr. Jensen would have on these attorneys who are now  
11 entering as Special Attorneys working under the supervision of  
12 the Western District?

13 MR. ANKNEY: Well, I would think the impact is ---

14 THE COURT: I guess I'm like: Where's the conflict?

15 MR. ANKNEY: The perception is that they report to  
16 Mr. Jensen. They would like to make Mr. Jensen -- And I'm not  
17 saying they would, but we don't know -- It's the appearance of  
18 the conflict that matters. It's the perception, certainly, by  
19 my clients and I think a reasonable person is that if you  
20 recuse the office, you can't then carve out and appoint  
21 somebody and somehow waive the conflict and have these people,  
22 who still owe their livelihood, they still owe their  
23 promotion, they still owe their jobs to a man who has been  
24 adverse to them in the past, and that client will still be  
25 adverse to them during this trial.

1 THE COURT: Do you have any authority or any cases or  
2 anything for guidance here that ---

3 MR. ANKNEY: I mean this came up -- I found out about  
4 this on Friday that the office is recused.

5 THE COURT: Okay. I will be happy to give you some  
6 time.

7 MR. ANKNEY: Sure.

8 THE COURT: I would -- I would appreciate some  
9 additional briefing on it.

10 MR. ANKNEY: Okay.

11 THE COURT: That would be helpful because I don't  
12 know off the top of my head, and I don't know the procedures.  
13 I am familiar with the *Sigillito* case, but that case -- that  
14 -- those procedures were put into place just before I started  
15 here in like 2010 or whatever. So I'm -- I am vaguely  
16 familiar with it, but I haven't looked at the facts of that  
17 case. So what -- I would appreciate a little guidance here  
18 and allow you some time to brief it.

19 MR. ANKNEY: Sure. Is that case a reported case or  
20 is that just a ---

21 THE COURT: Well, the *Sigillito* case is definitely a  
22 reported case. It's the issue of -- is the issue of the  
23 assignment of the attorney or U.S. Attorney's Office in  
24 somewhere. I'm not sure what that -- how that was actually  
25 done. I don't know if there was any objection to it when --

1 when he was -- when that assignment was ---

2 MR. BIRMINGHAM: Your Honor, I don't know for sure.

3 THE COURT: Right.

4 MR. BIRMINGHAM: I think maybe there was some at --  
5 close to trial among the points on appeal.

6 THE COURT: Okay.

7 MR. BIRMINGHAM: It may have gotten into that issue.  
8 I would ask that -- I don't know that the matter is properly  
9 before the Court. In other words, there was an Entry of  
10 Appearance and there's an objection --

11 THE COURT: Right.

12 MR. BIRMINGHAM: -- to the Entry of Appearance.

13 THE COURT: Right.

14 MR. BIRMINGHAM: That's the only thing that's before  
15 the Court. There's no -- There's no wrongful objection.  
16 There's no rule or case law or any kind of support to object  
17 to our entering our appearance. But basically ---

18 THE COURT: So -- Yeah. So the issue is: You can  
19 enter your appearance but then the Defendants can object --  
20 can -- can bring up the issue of conflict of interest.

21 MR. BIRMINGHAM: Essentially wanting to recuse --

22 THE COURT: Right; right.

23 MR. BIRMINGHAM: -- now additional or the -- even --  
24 even under this appointment, they now want to recuse Mr. Sison  
25 and myself as Special Attorneys acting under the supervision

1 of the Western District.

2 THE COURT: All right.

3 MR. BIRMINGHAM: That's a separate issue. That's a  
4 recusal issue.

5 THE COURT: Right.

6 MR. BIRMINGHAM: We're going to have to, as proper --  
7 As currently framed, it's not proper.

8 THE COURT: It's an objection, you're right.

9 MR. BIRMINGHAM: So we would ask that the actual  
10 entry -- the objection to the Entry of Appearance -- I have to  
11 tell you I wasn't surprised, but there is no case law on  
12 objections on Entry of Appearance.

13 THE COURT: I kind of assumed that.

14 MR. BIRMINGHAM: So -- So given that we got a lawful  
15 appointment, as it relates to our proceedings today, if they  
16 can come up with some case law that would suggest something,  
17 they can file a separate motion. But in terms of this  
18 objection, we would ask that that objection be denied.

19 THE COURT: Okay. What do you say about the  
20 objection to the Entry of Appearance?

21 MR. ANKNEY: I think it's up to the Court to  
22 decide --

23 THE COURT: Okay.

24 MR. ANKNEY: -- whether they should be allowed to  
25 enter on this case.

1 THE COURT: All right.

2 MR. ANKNEY: So if they have a conflict, they  
3 shouldn't be allowed to enter.

4 THE COURT: Okay.

5 MR. ANKNEY: I think my objection is a proper  
6 objection.

7 THE COURT: Okay.

8 MR. ANKNEY: And the Court can --

9 THE COURT: Okay.

10 MR. ANKNEY: -- either approve or not approve that.

11 THE COURT: Okay.

12 MR. ANKNEY: Yes.

13 THE COURT: All right. So what I'm going to do at  
14 this point is: I am going to overrule your objection to the  
15 Entry of Appearance because with what I've had before me and  
16 the arguments that have been made at this point, I believe  
17 that the Entry of Appearance should be allowed under the  
18 rules. And if there is a -- I guess a concern about recusal,  
19 then that can come up in a different manner --

20 MR. ANKNEY: Right.

21 THE COURT: -- and perhaps there will be some case  
22 law on that.

23 MR. ANKNEY: So I -- So as we leave here, there's no  
24 time limit then for me to file the motion. There's no motion  
25 before the Court as I understand it.

1 THE COURT: There's no motion before the Court.

2 MR. ANKNEY: Okay. So ---

3 THE COURT: So if you wish to file a motion, this is  
4 a -- this case is still being the complex case and, therefore,  
5 we don't have at this point any pretrial motion deadlines, but  
6 I think that was something else we were going to talk about  
7 today which is --

8 MR. ANKNEY: Sure.

9 THE COURT: -- where we are as far as the status of  
10 the case.

11 So on the issue of the objection to Entry of  
12 Appearance, I'm going to overrule Defendant Diversified  
13 Ingredients' objection to the Entry of Appearance on  
14 Mr. Birmingham and Mr. Sison as Special Attorneys in this  
15 matter.

16 MR. ANKNEY: Okay, Your Honor.

17 THE COURT: All right. So where are we on the status  
18 hearing?

19 MR. BIRMINGHAM: Thank you, Your Honor. The -- It  
20 kind of dovetails into the issue before. So we're -- we're  
21 now working with the Western District, acting to get them up  
22 to speed. Plea agreements, possible dispositions, additional  
23 charges, that will all be presented and done with the approval  
24 and direction of the Western District.

25 I know that there is a -- that process is under way

1 specifically as to Wilbur-Ellis and Mr. McAtee based on the  
2 filings that the Court has regarding a noticed-up plea date  
3 and then Mr. D'Agrosa's notice of status.

4 As I informed the Court informally, Judge Sippel has  
5 set the status conference for the case. I believe it was -- I  
6 apologize, Your Honor -- maybe January 19th, but I don't have  
7 the date right in front of me. I know that the Court, I  
8 believe it set a new status conference for that date, so maybe  
9 the morning of or the same date as the civil conference.

10 THE COURT: Right.

11 MR. BIRMINGHAM: And I think Judge Sippel's thought,  
12 and I think it should be echoed here, is that the Western  
13 District's going to need a bit of time to get up to speed on  
14 the case. And -- And as we marshall through charging  
15 decisions or plea dispositions, whether or not -- It seems  
16 unnecessary to bring certain counsel in for status conferences  
17 when we know where we're headed there. So we would ask for  
18 that additional 30 days to allow the Western District the  
19 opportunity to review the matters, specifically pleas and  
20 maybe future charging decisions, and that a status conference  
21 in mid to late January would be appropriate.

22 THE COURT: All right. What is the position of the  
23 Defendants with regard to continuing or setting a new status  
24 conference for -- I believe it was January 19th in the ---

25 MR. ANKNEY: The notes I have is the 18th.

1 THE COURT: The 18th, okay.

2 MR. ANKNEY: That is not a good day for me.

3 THE COURT: Okay. Okay. Would you ---

4 MR. ANKNEY: Not until after the 29th for either one  
5 of us.

6 THE COURT: Okay. That's a Monday. And I believe  
7 that ---

8 (Pause)

9 So that week of January 29th, would that work for  
10 you?

11 MR. BIRMINGHAM: Any date's going to work for us,  
12 Your Honor.

13 THE COURT: Okay. All right.

14 MR. SPRAGUE: Your Honor, that -- any -- any date ---

15 THE COURT: Oh, you know what? I'm not going to be  
16 here. That's why. That's why. It's an ABA meeting. Yep,  
17 I'm going to be out. The week before, I think they're --  
18 that's when they have -- Oh, the week of the 22nd, that is the  
19 week I'm on duty, I believe. But he said they're not  
20 available until the 29th, so we'd have to do something in  
21 February.

22 (Pause)

23 THE COURT: So why don't we -- Is February 7th, which  
24 is a Wednesday, would that work for everyone?

25 MR. BIRMINGHAM: Yes, Your Honor.

1 THE COURT: Okay. I want to make sure. I have to  
2 make sure that's right. I don't have ---

3 MR. SPRAGUE: Your Honor, on behalf of Wilbur-Ellis,  
4 we're fine setting a date whenever it's convenient for the  
5 Court's calendar in this window of time.

6 THE COURT: Okay.

7 MR. SPRAGUE: And we'll make it work. And we join in  
8 the request for that continuance --

9 THE COURT: Okay.

10 MR. SPRAGUE: -- to that approximate date.

11 THE COURT: All right. I'm going to call Gen just to  
12 be sure because I don't have my calendar as I should have.

13 (Pause)

14 THE COURT: Okay. It looks like February 7th will  
15 work, if that works for everyone. I will set it for 10:00 in  
16 the morning on February 7th, and hopefully we will have made  
17 some progress by then.

18 All right. Is there anything else we need to discuss  
19 at this time?

20 MR. BIRMINGHAM: No, Your Honor.

21 THE COURT: All right. Well, thank you very much,  
22 and I will -- and have happy holidays, all.

23 MR. BIRMINGHAM: You too, Your Honor.

24 MR. SPRAGUE: Thank you Your Honor.

25 MR. ANKNEY: Thank you.

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(Hearing adjourned at 10:36 AM.)

CERTIFICATE OF OFFICIAL REPORTER

I, Deborah A. Kriegshauser, Federal Official Realtime Court Reporter, in and for the United States District Court for the Eastern District of Missouri, do hereby certify that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically-reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 12th day of January, 2018.

/s/ Deborah A. Kriegshauser

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DEBORAH A. KRIEGSHAUSER, FAPR, RMR, CRR  
FEDERAL OFFICIAL COURT REPORTER

**FILED**

**FEB 14 2018**

**U. S. DISTRICT COURT  
EASTERN DISTRICT OF MO  
ST. LOUIS**

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

WILLIAM DOUGLAS HANING,

Defendant.

**4:18CR000139 RWS/JMB**

**INDICTMENT**

The Grand Jury charges that:

**Count 1**

**(Conspiracy: 18 U.S.C. § 1349)**

1. Beginning sometime prior to July of 2007, the exact date being unknown to the Grand Jury, and continuing through October of 2014, in the Eastern District of Missouri, and elsewhere, the defendant,

**WILLIAM DOUGLAS HANING,**

did knowingly and willfully combine, conspire, confederate and agree with others both known and unknown to the Grand Jury, to commit various offenses defined in Title 18, United States Code, Part 1, Chapter 63, that is:

a. having knowingly devised and intending to devise a scheme to defraud, and to obtain money and property by means of false and fraudulent pretenses, representations and promises, and for the purpose of executing and attempting to execute that scheme, did mail, cause to be mailed, cause to be delivered by mail, and deposit and cause to be deposited matters and things to be sent and delivered by private and commercial interstate carriers, in violation of Title 18, United States Code, Section 1341; and

- d. has been substantially diminished in value; or
- e. has been commingled with other property which cannot be divided without difficulty,

the United States of America will be entitled to the forfeiture of substitute property pursuant to Title 21, United States Code, Section 853(p).

A TRUE BILL.

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FOREPERSON

JEFFERSON SESSIONS  
United States Attorney General  
TIMOTHY GARRISON  
United States Attorney  
WESTERN DISTRICT OF MISSOURI

---

GILBERT C. SISON, #52346MO  
Special Attorney to the United States Attorney General

**FILED**

**MAY 11 2018**

**U.S. DISTRICT COURT  
EASTERN DISTRICT OF MO  
ST. LOUIS**

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

GREGORY S. McKINNEY,

Defendant.

**4:18CR414 RWS**

**INFORMATION**

The United States Attorney for the Western District of Missouri charges that:

**Count 1**

**(Introduction of Adulterated Food into Interstate Commerce)**

At all times material to this Information:

**The United States Food and Drug Administration**

1. The United States Food and Drug Administration ("FDA") was the agency of the United States government responsible for enforcing the provisions of the Federal Food, Drug, and Cosmetic Act ("FDCA"). The FDA's responsibilities included, among other things, regulating the distribution of food shipped, delivered, and received in interstate commerce, including articles offered for import into the United States.

**The Federal Food, Drug, and Cosmetic Act**


2. Under the FDCA, the term "food" meant articles used for food or drink for man or other animals and articles used for components of any such article. Title 21, United States Code, Section 321(f).

3. Under the FDCA, the term "interstate commerce" meant commerce between separate States in the United States and commerce between any State of the United States and any place outside thereof. Title 21, United States Code, Section 321(b).

the United States of America will be entitled to the forfeiture of substitute property pursuant to Title 21, United States Code, Section 853(p).

Respectfully submitted,

JEFFERSON SESSIONS  
United States Attorney General  
TIMOTHY GARRISON  
United States Attorney  
WESTERN DISTRICT OF MISSOURI

  
CHARLES S. BIRMINGHAM, #47134MO  
Special Attorney to the United States Attorney General

  
GILBERT C. SISON, #52346MO  
Special Attorney to the United States Attorney General

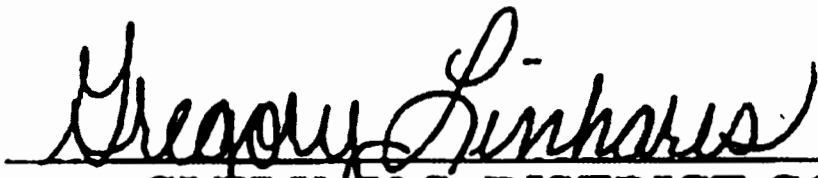
Case: 4:18-cr-00414-RWS Doc. #: 1 Filed: 05/11/18 Page: 7 of 7 PageID #: 7

UNITED STATES OF AMERICA       )  
EASTERN DIVISION                )  
EASTERN DISTRICT OF MISSOURI   )

I, Charles S. Birmingham, Special Attorney to the United States Attorney General, being  
duly sworn, do say that the foregoing information is true as I verily believe.

  
\_\_\_\_\_  
CHARLES S. BIRMINGHAM, #47134MO

Subscribed and sworn to before me this   2   day of May, 2018.

  
\_\_\_\_\_  
CLERK, U.S. DISTRICT COURT

By:   
\_\_\_\_\_  
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

WILLIAM DOUGLAS HANING,

Defendant.

No. 4:18-CR-00139-RWS-NAB

**GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANT'S  
MOTION TO DISMISS INDICTMENT, OR IN THE ALTERNATIVE,  
MOTION TO DISQUALIFY PROSECUTION TEAM**

The United States of America, by undersigned counsel, respectfully asks this Court to deny Defendant William Douglas Haning's Motion to Dismiss Indictment, or in the Alternative, Motion to Disqualify Prosecution Team (D.E. 72).

On November 7, 2018, Attorney General Jefferson B. Sessions resigned from office and, on the same date, President Donald J. Trump appointed Sessions' Chief of Staff, Matthew G. Whitaker, to serve temporarily as Acting Attorney General under the Federal Vacancies Reform Act (FVRA). The appointment of Whitaker as the Acting Attorney General is the precipitating event for the filing of the motion to dismiss. However, as explained below, Whitaker's November 2018 appointment as the Acting Attorney General (a) does not provide a basis for dismissal of the indictment which has been pending against Haning since February 2018, and (b) is irrelevant to the question of whether attorneys designated as Special Attorneys to the Attorney General since November 2017 may serve, and continue to serve, as attorneys on the team assigned to this prosecution.

### **Procedural Background**

This case sits at the intersection of multiple related civil and criminal proceedings in this district. It is important to recall and set forth the relevant history from those civil and criminal proceedings, both for the sake of establishing a clear record and as a preface to considering the merits of the legal claims presented in the pending defense motion.

In May 2014, Nestle Purina PetCare Company filed a civil complaint naming Blue Buffalo Company, Ltd. as the defendant, alleging that Blue Buffalo knowingly and fraudulently misled consumers about the ingredients in the pet food manufactured by Blue Buffalo. *See generally* EDMO Case No. 14-00859.

As the case developed through discovery, in June 2015 Blue Buffalo brought Wilbur Ellis Company and Diversified Ingredients, Inc., into the litigation as third-party defendants. (D.E. 333, Status Conference Agenda). Later still, Diversified Ingredients, Inc., as a third-party plaintiff, named Custom Ag Commodities, William Douglas Haning, and Henry R. Rychlik, Jr., as third party defendants. (D.E. 442, September 2015.)

Public knowledge of the facts underlying this developing civil litigation was one factor that prompted the start of a federal criminal investigation. In March 2017, criminal misdemeanor charges of adulteration and misbranding under the Food Drug and Cosmetic Act were filed against Henry Rychlik, Jr., Wilbur-Ellis Company, Colin McAtee, and Diversified Ingredients, Inc. (Case No. 17-100NAB, D.E. 1 and 11). Jeff Jensen, then an attorney in private practice at Husch Blackwell, entered his appearance as counsel for Wilbur-Ellis Company. (D.E. 3.)

After these criminal charges were filed, the United States filed a motion to intervene in Case No. 14-00859 for the limited purpose of staying discovery. (D.E. 1252 and 1253, Case No.

14-00859). On March 9, 2017, District Judge Sippel granted the motions and entered an order staying discovery. (D.E. 1259.)

In October 2017, Jeff Jensen became the Presidentially appointed, Senate-confirmed United States Attorney for the Eastern District of Missouri. Jeff Jensen's appointment as the EDMO USA raised two conflict of interest issues.

First, Jensen could no longer represent Wilbur-Ellis Company. His withdrawal as counsel for Wilbur-Ellis began on October 3, 2017, when a motion was filed in Case No. 17-100NAB to substitute Catherine Hanaway for Jeff Jensen as counsel for Wilbur-Ellis Company (D.E. 58). The motion was granted by the court on October 4, 2017, and thereafter Jensen was no longer the attorney of record for Wilbur-Ellis. (D.E. 59).

Second, after Jensen became the EDMO USA, there was a question about whether and in what manner the EDMO USAO he was now in charge of would/should be recused from further prosecution of the criminal cases where Jensen's former client, Wilbur-Ellis Company, and others were named as defendants.

Under long-standing procedures and protocols for dealing with such situations, the Department of Justice in Washington, D.C. took responsibility for undertaking this recusal analysis. On November 2, 2017, Associate Deputy Attorney General Scott Schools approved the recusal of the United States Attorney's office for the Eastern District of Missouri from the investigation and prosecution of *United States v. Custom Ag. Commodities, et al.*<sup>1</sup> and all related litigation. In a detailed memo (Attachment 1), the notice of recusal assigned supervision of the investigation and prosecution of the matter to the Western District of Missouri, and directed and

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<sup>1</sup> 'Custom Ag Commodities, et al.' was the designation given to the original U.S. Attorney's Office internal file. The related litigation under this umbrella includes *U.S. v. Rychlik, et al.* (17-CR-00100), *U.S. v. Haning* (18-CR-00139), and *U.S. v. McKinney* (18-CR-00414).

authorized then Acting United States Attorney Thomas M. Larson or his successor to “conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before magistrate judges, which the United States Attorney for the Eastern District of Missouri is authorized by law to conduct regarding this matter, and related matters.”

The assignment to the WDMO USAO also authorized specified Assistant United States Attorneys and personnel from the Eastern District of Missouri to continue working on the matter under the supervision and direction of the WDMO USAO, to include EDMO AUSAs Charles Birmingham, Gil Sison, and Kyle Bateman, as well as EDMO legal assistants Patricia Rockers and Julie Hurst, and EDMO IT Specialist Beau Toth.

On November 14, 15, and 16, 2017, EDMO AUSAs Charles S. Birmingham, Gilbert C. Sison, and Kyle Bateman were appointed Special Attorneys to the United States Attorney General (hereafter “Special Attorneys”) pursuant to 28 U.S.C. § 515. (Attachments 2-4) On November 14, 2017, WDMO AUSA Kathleen Mahoney was appointed to the same position. (Attachment 5)

On December 1, 2017, in Case No. 17-CR-00100, Charles Birmingham and Gilbert Sison accordingly filed an amended entry of appearance, as Special Attorneys. (D.E. 62.)

On December 5, 2017, in case number 17-CR-00100, defendant Diversified Ingredients, Inc. filed an objection to Mr. Birmingham’s entry of appearance. (D.E. 65.) The United States filed a response in opposition to that objection. (D.E. 67.) On February 12, 2018, defendant Diversified Ingredients withdrew its objection to the entry of appearance. (D.E. 80.). On July 6, 2018, Kyle Bateman entered his appearance in Case No. 17-CR-00100 as a Special Attorney. (D.E. 106.)

All four defendants in case number 17-CR-00100 have pled guilty pursuant to plea agreements (D.E. 86, 93, 110, 123) and, without objection, one or more of the designated

Special Attorneys, i.e., Charles Birmingham, Gilbert Sison, and Kyle Bateman, signed the plea agreements on behalf of the Government. (D.E. 87, 94, 112, 124.)

Thomas Larson was the Acting United States Attorney for the Western District of Missouri at the time of the recusal in November 2017. Thereafter, Timothy A. Garrison became the Presidentially-appointed, Senate-confirmed United States Attorney for the Western District of Missouri. To be clear, Mr. Garrison began serving as the Interim USA on January 5, 2018, and on April 26, 2018, the interim designation was removed following his confirmation by the United States Senate.<sup>2</sup> The November 2017 recusal specifically authorizes Acting United States Attorney Thomas Larson or his successor to exercise full authority in any aspect of the recusal matter.

In summary, since November 2, 2017, the United States Attorney's Office for the Western District of Missouri has been responsible for pursuing all "related matters" arising from the facts of the Nestle/Blue Buffalo civil litigation, one of which is this recusal case, *United States v. Haning*, whose procedural history is set forth below.

On February 14, 2018, a grand jury sitting in the Eastern District of Missouri returned an indictment in the instant case charging Haning with thirty-one counts, including one count of conspiracy to commit wire fraud in violation of 18 U.S.C. § 1349 and thirty counts of wire fraud in violation of 18 U.S.C. § 1343, based on the alleged misbranding and adulteration of pet food

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<sup>2</sup> On January 4, 2018, Attorney General Jeff Sessions appointed Timothy A. Garrison as Interim United States Attorney for the Western District of Missouri. While Garrison was serving as the Interim United States Attorney, President Donald J. Trump on February 20, 2018, submitted to the United States Senate Garrison's nomination to serve as the Presidentially-appointed Western District of Missouri United States Attorney. On April 26, 2018, the United States Senate unanimously confirmed Garrison's nomination to serve as the Western District of Missouri United States Attorney. Senior Eighth Circuit Judge Duane Benton thereafter administered the oath of office to Garrison and he began serving as the Presidentially-appointed, Senate-confirmed United States Attorney for the Western District of Missouri. In summary, it is beyond dispute that the Western District of Missouri has had a lawfully appointed United States Attorney in place at all times relevant to the pending defense motion.

manufactured and/or sold by and through American By-Products, Diversified Ingredients, Inc., Wilbur Ellis Company, Custom AG Commodities, LLC, and multiple pet food manufacturers and companies. Case No. 18-00139RWS, D.E. 1 and 2. The indictment was signed by Gilbert C. Sison, in his capacity as a Special Attorney, acting under the direct supervision of the United States Attorney for the Western District of Missouri. Birmingham, Sison, and Bateman all subsequently entered their appearance in this case as Special Attorneys. Case No. 18-CR-00139, D.E. 4 and 8.

Even though all the facts stated above were matters of public record, and therefore known to Haning and his attorneys since the return of the February 2018 indictment, it was not until nine months later, on November 13, 2018, that Haning moved to disqualify the attorneys on the prosecution team assigned to this case (D.E. 72). Between the return of the February 2018 indictment and the filing of the pending motion to disqualify on November 13, 2018, Haning filed a motion to change venue (D.E. 18), a motion for a court order releasing lis pendens (D.E. 32), and multiple motions for permission to travel (D.E. 24, 41, and 62). Nowhere in any of these prior motions did Haning assert that the prosecution team consisting of federal prosecutors Birmingham, Sison, and Bateman (as Special Attorneys under the direct supervision of the WDMO USAO) was not ethically permitted to respond to his motions. Nor did Haning raise any objections about the ethical composition of the prosecution team after the Government filed responses in opposition to his venue and lis pendens motions, nor after the Government did not oppose his travel motions.

On November 7, 2018, Attorney General Jefferson B. Sessions resigned from office and, on the same date, President Donald J. Trump appointed Sessions' Chief of Staff, Matthew G. Whitaker, to serve temporarily as Acting Attorney General under the Federal Vacancies Reform Act (FVRA). The appointment of Whitaker as the Acting Attorney General is the precipitating event for the filing of the motion to dismiss. However, as explained below, Whitaker's

November 2018 appointment as the Acting Attorney General (a) does not provide a basis for dismissal of the indictment which has been pending against Haning since February 2018, and (b) is irrelevant to the question of whether attorneys designated as Special Attorneys since November 2017 may serve, and continue to serve, as attorneys on the team assigned to this prosecution.

### **Arguments and Authorities**

The President's designation of the Acting Attorney General was valid, but the Court need not address the designation's validity in this case. That is because the legal authority of the Department of Justice to prosecute this case does not depend in any way on whether a vacancy in the office of Attorney General has been properly filled. The prosecution is being supervised by a United States Attorney pursuant to statutory authority, and the United States Attorney is supervised by the Senate-confirmed Deputy Attorney General. In any event, the alleged invalidity of the Acting Attorney General's designation does not justify dismissal of the indictment.

#### **A. The President's Temporary Designation of Mr. Whitaker as the Acting Attorney General was Valid as both a Statutory and a Constitutional Matter**

The Department of Justice's Office of Legal Counsel has determined that the President lawfully designated Mr. Whitaker as the Acting Attorney General pursuant to 5 U.S.C. § 3345(a)(3) and that Mr. Whitaker's appointment was constitutional. *See* Office of Legal Counsel, *Designating an Acting Attorney General* (Nov. 14, 2018), available at <https://www.justice.gov/olc/file/1112251/download>. Following the outline of that memo, we discuss below the statutory justification for the appointment of the Acting Attorney General and then the constitutional propriety of said appointment.

### **1. The Federal Vacancies Reform Act (FVRA)**

Under the FVRA when a presidentially appointed, Senate-confirmed officer “dies, resigns, or is otherwise unable to perform the functions and duties of the office,” the “first assistant” to that office by default “shall perform the functions and duties of the office temporarily in an acting capacity.” 5 U.S.C. § 3345(a)(1). However, the FVRA also authorizes the President to override that default rule. As relevant here, “the President (and only the President) may direct an officer or employee” of the agency in which the vacancy occurs “to perform the functions and duties of the vacant office temporarily in an acting capacity,” as long as the officer or employee served in the agency for at least 90 of the 365 days preceding the vacancy and is paid at least at the GS-15 level. 5 U.S.C. § 3345(a)(3). An individual whom the President designates under that provision may serve in an acting capacity subject to the time limitations of 5 U.S.C. § 3346.

The President invoked 5 U.S.C. § 3345(a)(3) to designate Mr. Whitaker as the Acting Attorney General following former Attorney General Sessions’ resignation from office. *See* OLC Memorandum 1. At the time, Mr. Whitaker had been serving in the Department as Chief of Staff and Senior Counselor to the Attorney General, and he met the statutory requirements of having served in the Department of Justice for at least 90 days prior to the vacancy at a rate of pay of GS-15 or higher. *See id.* at 5. Defendant does not contend otherwise. Accordingly, Mr. Whitaker’s appointment as Acting Attorney General satisfied the plain terms of Section 3345(a)(3).

A separate statute, 28 U.S.C. § 508, establishes a line of succession for the Attorney General, but it is not the exclusive means for addressing such a vacancy, for reasons the Department’s Office of Legal Counsel has explained at length. *See* OLC Memorandum 5-8; *see also Authority of the President to Name an Acting Attorney General*, 31 Op. O.L.C. 208, 209-210 (2007). Section 508(a) states that “[i]n case of a vacancy in the office of Attorney General, or of

his absence or disability, the Deputy Attorney General may exercise all the duties of that office.” Section 508(a) also specifies that “for the purpose of section 3345 of title 5 the Deputy Attorney General is the first assistant to the Attorney General.” On its face, the statute does not purport to be the exclusive means of addressing a vacancy in the office of the Attorney General, and indeed the reference to the first section of the FVRA (“section 3345 of title 5”) in Section 508(a) itself confirms the opposite.

Nor does the FVRA itself make 28 U.S.C. § 508 exclusive. The relevant provision, entitled “Exclusivity,” states that “Sections 3345 and 3346 are the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any [presidentially appointed, Senate-confirmed] office of an Executive agency,” unless another statute “expressly . . . designate[s] an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity.” 5 U.S.C. § 3347(a)(1)(B). Section 508(a) is a statute that “designate[s] an officer or employee to perform the functions and duties of a specified office” within the meaning of that provision. *See* 31 Op. O.L.C. at 208. But by the plain terms of the FVRA, the existence of such an agency-specific succession statute means only that the FVRA is not “*exclusive*,” not that the FVRA is therefore rendered unavailable or inapplicable. 5 U.S.C. § 3347(a) (emphasis added). When an agency-specific statute, such as Section 508(a), provides a default rule for succession in office, 5 U.S.C. § 3347 ensures that the President may either allow that default rule to operate or may invoke the FVRA to designate an alternate acting officer. A contrary reading would invert the meaning of the FVRA’s exclusivity provision, transforming it from a rule about when the FVRA is exclusive of other statutes into one about when other statutes are exclusive of the FVRA.

The structure of the FVRA confirms that 5 U.S.C. § 3347 does not render the FVRA inapplicable in the face of an agency-specific vacancy statute, including 28 U.S.C. § 508. Congress addressed the inapplicability of the FVRA elsewhere in the statute. Section 3345 applies in general to vacancies in an “Executive agency.” 5 U.S.C. § 3345(a); *see also* 5 U.S.C. § 105 (defining “Executive agency” to include any “Executive department,” such as the Department of Justice). In a separate provision, entitled “Exclusion of certain officers,” Congress qualified the scope of the statute by providing that “Section[] 3345 . . . shall not apply” to certain specified officers in certain specified agencies. 5 U.S.C. § 3349c. The Attorney General is not among the officers excluded from coverage under the FVRA by Section 3349c. *See ibid.*

By contrast, the vacancy statute that preceded the FVRA contained a provision authorizing the President to designate a presidentially appointed, Senate-confirmed officer to perform the duties of a vacant office in some circumstances, but that provision expressly did “not apply to a vacancy in the office of Attorney General.” 5 U.S.C. § 3347 (1994). Indeed, similar provisions can be traced to the 1870s. *See, e.g.,* Rev. Stat. § 179 (1st ed. 1875), 18 Stat. 1, 27. But in the FVRA, Congress omitted—and therefore eliminated—the prior limitation. *See* OLC Memorandum 7; *see also, e.g.,* *Murphy v. Smith*, 138 S. Ct. 784, 789 (2018) (giving effect to Congress’s purposeful omission of prior statutory language); *Brewster v. Gage*, 280 U.S. 327, 337 (1930) (noting that “[t]he deliberate selection of language so differing from that used in earlier acts indicates that a change of law was intended”).

In light of the FVRA’s text and structure, it is unsurprising that the only court of appeals to address the question has concluded that office-specific vacancy statutes do not displace the President’s FVRA authority. In *Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550 (9th Cir. 2016), the court of appeals rejected the argument that the FVRA was inapplicable where

an agency-specific statute “expressly provide[d] a means for filling” the vacancy in question. *Id.* at 556 (discussing 29 U.S.C. § 153(d)). The court concluded that “the text of the respective statutes” “belied” any such argument. *Id.* at 555. The existence of an agency-specific statute, the court explained, means only that “neither the FVRA nor the [agency-specific statute] is the *exclusive* means of appointing” an acting officer, and “the President is permitted to elect between these two statutory alternatives.” *Id.* at 556; *see also English v. Trump*, 279 F. Supp. 3d 307, 323-24 (D.D.C. 2018) (reaching a similar conclusion with respect to the office of the Director of the Bureau of Consumer Financial Protection).

That conclusion is confirmed by the legislative history of the FVRA. A Senate Committee Report accompanying a bill that was the basis for the FVRA contained a list of then-existing, agency-specific statutes “that expressly authorize the President . . . to designate an officer to perform the functions and duties of a specified office temporarily in an acting capacity, as well as statutes that expressly provide for the temporary performance of the functions and duties of an office by a particular officer or employee.” S. Rep. No. 105-250, at 15 (1998). The Report stated that the bill would “retain[]” those statutes, *ibid.*, but that in those instances the “Vacancies Act would continue to provide an *alternative* procedure for temporarily occupying the office,” *id.* at 17 (emphasis added). This passage describing the two types of agency-specific statutes that the bill would retain -- those that expressly authorize the President to designate an officer to perform the functions and duties of the vacant office, and those (like 28 U.S.C. § 508) that expressly provide for the performance of those duties by a particular officer, *see* S. Rep. No. 105-250, at 15 -- directly corresponds to a provision in the Senate bill containing the language enacted as Subparagraphs (A) and (B) of 5 U.S.C. § 3347(a)(1). *See* S. Rep. No. 105-250, at 26 (proposed 5 U.S.C. § 3347(a)(2)(A) and (B)).

The drafting history further confirms that the FVRA remains available as an alternative means of addressing a vacancy in the office of the Attorney General. A provision in the bill as reported in the Senate would have provided that “[w]ith respect to the office of the Attorney General . . . the provisions of section 508 shall be applicable,” S. Rep. No. 105-250, at 25, which was intended to limit the President’s authority to designate a person to perform the duties of Attorney General via the FVRA, *see id.* at 13. But Congress omitted that limitation from the final version of the Act. The deletion of that limitation means that the office of Attorney General is within the category of offices for which the FVRA is an alternative to the agency-specific statute. And indeed, 28 U.S.C. § 508 was included in the list of then-existing agency-specific statutes in the Senate Report. *See id.* at 16. “Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (citation omitted); *cf.* p. 5, *supra*.

## **2. The Appointments Clause of the Constitution**

Mr. Whitaker’s designation to serve temporarily as Acting Attorney General conformed to the Appointments Clause, U.S. Const. art. II, § 2, cl. 2. That Clause requires the President to appoint principal officers, “by and with the Advice and Consent of the Senate,” but permits Congress to vest the appointment of “inferior Officers . . . in the President alone, in the Courts of Law, or in the Heads of Departments.” *Ibid.*; *see Lucia v. SEC*, 138 S. Ct. 2044, 2051 & n.3 (2018); *Edmond v. United States*, 520 U.S. 651, 660 (1997).

Although the Attorney General is surely a principal officer, the Appointments Clause does not require that an individual who merely acts temporarily as Attorney General must also be appointed in the manner of a principal officer. To the contrary, both long-standing precedent of

the Supreme Court and historical practice demonstrate that “the temporary nature of acting service weighs against principal-officer status.” OLC Memorandum 10. In *United States v. Eaton*, 169 U.S. 331 (1898), the Court held that a “subordinate officer” (there, a vice-consul) may be “charged with the performance of the duty of” a principal officer “for a limited time, and under special and temporary conditions,” without “thereby transform[ing] into” a principal officer, *id.* at 343. The Court therefore rejected an Appointments Clause challenge to a scheme in which the vice-consul, who was not appointed as a principal officer, temporarily functioned as an acting principal officer (consul-general) during a vacancy. *See id.* at 331-332, 339-340, 343-344.

Nor is *Eaton* exceptional. As the Court noted, the “practice of the government” for decades before that case confirmed the shared understanding of both the Legislative and Executive Branches that a non-Senate-confirmed officer may serve temporarily as an acting principal officer without violating the Appointments Clause. 169 U.S. at 344 (citation omitted); *see* OLC Memorandum at 10-18 (collecting historical evidence dating to 1792 and spanning more than 160 individual instances, including examples of non-Senate-confirmed officers serving as Acting Secretary of State, Acting Secretary of the Treasury, Acting Secretary of War, and Acting Attorney General); *cf. NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014) (noting that “historical practice” is entitled to “significant weight” in addressing the separation of powers) (emphasis omitted). Given the “limited” and “temporary” nature of his duties, *Eaton*, 169 U.S. at 343, an Acting Attorney General is not a principal officer for purposes of the Appointments Clause. Congress has permissibly vested the authority to select non-Senate-confirmed officials to be Acting Attorney General (or many other acting officers) in the President alone. By doing that in the FVRA, it has simply restored a power that it had repeatedly granted to the President with respect to the heads of

executive departments in multiple statutes between 1792 and 1868. *See* OLC Memorandum 11-12.

*Eaton*'s holding is not limited to periods of exigency. In *Eaton* itself, the Supreme Court stated that Congress's "manifest purpose" in distinguishing between consuls and vice-consuls was to "limit the period of duty to be performed by the vice-consuls, and thereby to deprive them of the character of 'consuls,' in the broader and more permanent sense of that word." 169 U.S. at 343. Thus, the "special and temporary conditions" recognized in *Eaton* were not the particular exigency associated with the facts of that case, but the limits of the then-existent regulatory scheme, which permitted service in any case of "the absence or the temporary inability of the consul," whatever the cause. *Id.* at 342; *see also id.* at 341.

Moreover, the Court has consistently described *Eaton* as turning on the temporary nature of the service, not on any particular exigency. In *Edmond*, for example, the Court explained *Eaton* as finding that "a vice consul charged temporarily with the duties of the consul" is an inferior officer, 520 U.S. at 661, with no mention of any emergency circumstances. Likewise, in *Morrison v. Olson*, 487 U.S. 654 (1988), the Court described *Eaton* as approving of the practice of appointing acting vice-consuls "during the temporary absence of the consul," *id.* at 672, again without reference to any emergency other than the vacancy itself. *See also id.* at 721 (Scalia, J., dissenting) (noting that *Eaton* "held that the appointment . . . of a 'vice-consul,' charged with the duty of temporarily performing the function of the consul, did not violate the Appointments Clause"); *cf. Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 537 F.3d 667, 708 n.17 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (citing *Eaton* for the proposition that "[t]he temporary nature of the office is the . . . reason that *acting* heads of departments are permitted to exercise authority without Senate confirmation"), *aff'd in part and rev'd in part*, 561 U.S. 447 (2010).

Nor is *Eaton* distinguishable because it concerned “consular officers” abroad. The decision was not reasoned on those terms. Instead, the Court explained that a contrary decision would “render void *any and every* delegation of power to an inferior to perform *under any circumstances* or exigency.” *Eaton*, 169 U.S. at 343 (emphases added). Indeed, the Appointments Clause applies equally to “public Ministers and Consuls . . . and all other Officers of the United States.” U.S. Const. art. II, § 2, cl. 2. There is not one constitutional rule for consuls and vice-consuls and another for domestic officers, but rather a single Appointments Clause that has long been understood to permit the President to make a temporary acting designation like the one at issue here.

In support of his position that Associate Attorney General Whitaker’s appointment is illegal and unconstitutional, Haning cites *NLRB v. SW General, Inc.*, 137 S.Ct. 929 (2017). The Supreme Court in *NLRB* held that the Federal Vacancies Reform Act did not permit an acting general counsel of the NLRB to remain in that position once he was presidentially nominated for that position. *Id.* at 944.

Applying the holding of *NLRB* to the facts of this case, if President Trump were to nominate Acting Attorney General Whitaker to be the next Attorney General of the United States, Whitaker could not also continue to serve as the Acting Attorney General. Since that has not happened, the Supreme Court decision in *NLRB* is inapplicable here.

In summary, and for the reasons stated in the Office of Legal Counsel opinion, Haning is plainly incorrect in his assertion that the Acting Attorney General’s designation is invalid. If the Court reaches the issue, it should follow the reasoning set forth in the Office of Legal Counsel’s opinion. As explained below, however, the Court need not reach this issue.

**B. Dismissal is Not Justified Even if the Designation of Whitaker as Acting Attorney General Was Invalid**

Defendant Haning argues that the Acting Attorney General lacks constitutional authority to represent the United States and that his lack of authority flows to Special Attorneys to the United States Attorney General, meaning that the indictment must be dismissed. This argument reflects a misunderstanding of the basic constitutional and statutory concepts relevant to this motion.

The Appointments Clause requires the President, “with the Advice and Consent of the Senate,” to “appoint” all “Officers of the United States . . . which shall be established by law.” U.S. Const. art. II, § 2, cl. 2. This method is the default means of appointing all officers and the exclusive means of appointing *principal* officers. *See Lucia v. S.E.C.*, 138 S. Ct. 2044, 2051 n.3 (2018). The Clause goes on to say, however, that Congress may vest the appointment of “inferior Officers . . . in the President alone, in the Courts of Law, or in the Heads of Departments.” U.S. Const. art. II, § 2, cl. 2.

Congress “established” the Attorney General as “the head of the Department of Justice.” 28 U.S.C. § 503. But Congress has also established the office of United States Attorney, directing the President to “appoint, by and with the advice and consent of the Senate, a United States attorney for each judicial district.” 28 U.S.C. § 541(a). The United States Attorney has the statutory authority and responsibility to “prosecute for all offenses against the United States” occurring “within his district.” 28 U.S.C. § 547(1). Congress has also established the office of Deputy Attorney General, 28 U.S.C. § 504, and has authorized the Attorney General to delegate any of his functions to “any other officer, employee, or agency of the Department of Justice,” 28 U.S.C. § 510. Moreover, in this particular case, and while Attorney General Sessions was still serving as the Presidentially-appointed, Senate-confirmed Attorney General of the United States,

the United States Attorney for the Western District of Missouri was specifically appointed as his delegee for purposes of this case and all matters related to it. (See Attachment 1, page 2). That delegation alone renders the defense motion meritless.

**1. This prosecution is under the supervision of a validly appointed United States Attorney.**

Although almost all of the functions of the Department of Justice and its officers are vested in the Attorney General, 28 U.S.C. 509, the Attorney General need not and in most cases does not exercise those functions himself. Nor does the authority of a United States Attorney to conduct litigation on behalf of the Department depend on any action by the Attorney General. By statute, Congress has expressly authorized each United States Attorney to, among other things, “prosecute for all offenses against the United States.” 28 U.S.C. 547. Thus, where a prosecution team is conducting a criminal prosecution under the direction and supervision of the U.S. Attorney, here the U.S. Attorney for the Western District of Missouri, Timothy A. Garrison, federal law expressly authorizes the conduct in that litigation, without the need for any separate authorization from the Attorney General. This means that the United States Attorney’s authority to conduct this prosecution does not depend on whether the Acting Attorney General has been validly assigned to his position by the President.

The United States Attorney for the Western District of Missouri, Timothy A. Garrison, supervises this prosecution and he was appointed by the President and confirmed by the Senate. That appointment fully complied with the Appointments Clause and Section 541(a). Because this prosecution is being supervised by a presidentially appointed and Senate-confirmed officer—the United States Attorney, who has statutory authority to prosecute, *see* 28 U.S.C. § 547(1)—there is no basis to dismiss the indictment.

**2. The Defendant has provided no basis for concluding that the Acting Attorney General has had any personal participation in this prosecution.**

Although an Attorney General may involve himself in particular cases handled by the Department, *see* 28 U.S.C. § 516, he is under no obligation to do so. Given the thousands of cases handled by the Department's litigating divisions and the offices of 93 U.S. Attorneys each year, it is not feasible for an Attorney General to participate personally in more than a small fraction of the Department's cases. This is especially true in criminal cases. The United States Sentencing Commission received reports of approximately 67,000 federal criminal cases in which the offender was sentenced in fiscal year 2017. *See* <https://www.ussc.gov/research/data-reports/overview-federal-criminal-cases-fiscal-year-2017>.

In order to establish any prejudice from the alleged defects in the Acting Attorney General's designation, the defendant would have to show that the Acting Attorney General has personally participated in this matter or otherwise personally affected its course and that the adverse actions were undertaken on his initiative or direction.

The fact that four prosecutors have participated in this case after being designated as Special Attorneys to the Attorney General pursuant to 28 U.S.C. § 515(b) does not mean they are being directly supervised by the Acting Attorney General. In fact, the Attorney General has delegated to the Deputy Attorney General the "appointment of special attorneys and special assistants to the Attorney General." 28 C.F.R. § 0.15(b)(1)(ii). And the Deputy Attorney General has authority to redelegate this authority to other officials. 28 C.F.R. § 0.15(c)(3). The Special Attorneys in this case were appointed by Scott Schools, who was an Associate Deputy Attorney General (See Attachment 1), and who reported to the Deputy Attorney General. The defendant has not shown that the Acting Attorney General has supervised the Special Attorneys involved in

this case. Mere speculation that the Acting Attorney General might take some action affecting this case is insufficient to warrant any relief, much less the drastic relief of dismissing the indictment.

**3. The Acting Attorney General's indirect supervision over the case as the head of the Department of Justice does not support dismissal.**

The Acting Attorney General's indirect involvement with this case as the acting head of the Department of Justice does not affect the validity of this prosecution. The defendant cannot support the sweeping claim that *every* officer within the Department of Justice would lack authority to prosecute criminal cases were the Acting Attorney General's designation invalid. Although the Attorney General is the "head of the Department of Justice," 28 U.S.C. § 503, the United States Attorneys and other Department officers are validly appointed officers of the United States in their own right and have statutory authority that is not contingent on the validity of the Attorney General's (or Acting Attorney General's) appointment. *See United States v. Hartwell*, 73 U.S. 385, 393 (1867) (once an officer is "appointed pursuant to law, [v]acating the office of his superior would not have affected the tenure of his place"). *Cf. Tenure of Office of Inspectors of Customs*, 2 Op. Atty. Gen. 410, 412 (1831) (office holders continue to hold office despite a vacancy or change in the person who exercised appointing authority). The 115,000-member Department of Justice is not a house of cards that falls whenever it is not headed by a Senate-confirmed officer.

The defendant's request to dismiss the indictment based on putative defects in the appointment of the Acting Attorney General also overlooks the independent role of the grand jury in this matter. The indictment was returned by the grand jury, which "is a constitutional fixture in its own right," *United States v. Williams*, 504 U.S. 36, 47 (1992) (quotation omitted), and "act[s] independently of either prosecuting attorney or judge." *Stirone v. United States*, 361 U.S. 212,

218 (1960). “An indictment returned by a legally constituted and unbiased grand jury . . . is enough to call for trial of the charge on the merits.” *Costello v. United States*, 350 U.S. 359, 363 (1956). And any failures by the Executive Branch, including prosecutorial misconduct in front of the grand jury, provide a court “no authority to dismiss the indictment . . . absent a finding that [the defendant] w[as] prejudiced by such misconduct.” *Bank of Nova Scotia v. United States*, 487 U.S. 250, 263 (1988).

The Acting Attorney General’s allegedly invalid designation does not affect the indictment’s validity. As an initial matter, the indictment was returned in February 2018, nine months before the Acting Attorney General’s appointment. The defendant cannot show any error or prejudice where the prosecutor before the grand jury was supervised by a validly appointed United States Attorney. *See United States v. Fowlie*, 24 F.3d 1059, 1066 (9th Cir. 2006) (participation of statutorily unauthorized Special Assistant U.S. Attorney in grand jury proceedings was harmless error where he was supervised by authorized Assistant U.S. Attorneys); *United States v. Vance*, 256 F.2d 82, 83 (6th Cir. 1958) (per curiam) (even if indictment had to be signed by U.S. Attorney, signature by AUSA is a harmless error).

#### **4. The validity of the Acting Attorney General’s designation does not affect this Court’s jurisdiction**

This Court has jurisdiction over this case regardless of the lawfulness of the Acting Attorney General’s appointment. The Court has jurisdiction under 18 U.S.C. § 3231 over “all offenses against the laws of the United States” within the district. The Acting Attorney General’s allegedly invalid designation does not strip the Court of jurisdiction. *See United State v. Plesinski*, 912 F.2d 1033, 1038 (9th Cir. 1990) (where a Special Assistant U.S. Attorney’s appointment was statutorily invalid, his “unauthorized appearance on behalf of the government did not deprive the

district court of jurisdiction over the proceedings”); *Home New Publishing Co. v. United States*, 329 F.2d 191, 193 (5th Cir. 1964) (participation of statutorily unqualified government counsel did not deprive court of jurisdiction where the case was supervised by an Assistant United States Attorney).

**C. There is no Basis to Disqualify the Prosecution Team**

Defendant Haning argues the Department of Justice attempted to circumvent U.S. Attorney Jeff Jensen’s recusal “by giving three AUSA’s (sic) the title ‘Special Attorney to the United States Attorney General’ for the limited purpose of this prosecution.” (D.E. 72 at 1.) However, even though this indictment has been pending for nine months, Haning did not challenge until now either the validity of the indictment or the status of the three EDMO prosecutors assigned to this case, who are supervised by the United States Attorney for the Western District of Missouri, Timothy A. Garrison, and his designees. In seeking to disqualify Birmingham, Sison, and Bateman, defendant Haning asks this court to disqualify three attorneys who have no conflict of interest and who are being supervised in this case by attorneys who have no conflict of interest. Moreover, Haning cites no impropriety by the prosecution team or its supervising attorneys, no facts or evidence supporting a need for disqualification, no violation of any rule by the prosecution team, in fact, nothing at all that would justify disqualifying the entire prosecution team, an action that would raise serious separation of powers concerns and likely would be reversible error.

The overwhelming weight of authority counsels against disqualification of an entire U.S. Attorney’s Office. “[E]very circuit court that has considered the disqualification of an entire United States Attorney’s office has reversed the disqualification.” *United States v. Bolden*, 353 F.3d 870, 879 (10th Cir. 2003)(internal citations and quotation omitted); *see also United States v. Hasarafally*, 529 F.3d 125, 128 (2d Cir.2008) (“While a private

attorney's conflict of interest may require disqualification of that attorney's law firm in certain cases, such an approach is not favored when it comes to the office of a United States Attorney, or, *a fortiori*, to the Department of Justice as a whole.") (internal citations omitted); *Cope v. United States*, 272 Fed.Appx. 445, 449 (6th Cir.2008) (rejecting ineffective assistance of counsel claim for failure to move to recuse prosecutor's office after murder threat against prosecutor, explaining that "[d]isqualifying an entire United States Attorney's office is almost always reversible error, regardless of the underlying merits of the case") (quoting *Bolden*, 353 F.3d at 876). This strongly counsels against disqualification in this case.

*United States v. Basciano*, 763 F.Supp2d 303, 313-14 (E.D.N.Y. 2011).

The Department of Justice, through a careful and practical arrangement, has insured that no one assigned to the prosecution of this case, and others related to it, has either an actual conflict of interest, or the appearance of a conflict of interest, that would ethically preclude them from participating as members of the prosecution team. By divesting EDMO USA Jensen of any authority to act in this case and others related to it, all concerns related to his actual conflict of interest – based on his former representation of Wilbur-Ellis – have been addressed fully. By installing a conflict-free supervisory structure over the actual members of the prosecution team, all concerns related to the appearance of a conflict of interest also have been addressed fully. No member of the prosecution team, i.e., the United States Attorney for the Western District of Missouri, the attorneys and staff in the Western District of Missouri that work for the United States Attorney in the Western District of Missouri, and certainly none of the persons appointed as Special Attorneys, has either an actual conflict of interest or the appearance of one.

Haning argues there is no precedent for the type of conflict-free supervisory structure installed in this case. This assertion completely overlooks at least one such precedent, and one that would not have been difficult for Haning to identify because the precedent occurred within a

fairly recent and highly publicized prosecution in this district. *United States v. Martin Sigillito*, Case No. 11-CR-00168-LRR.

In the *Sigillito* case, the EDMO USAO was recused and the WDMO USAO was assigned responsibility for prosecuting the case. All members of the prosecution team were appointed as Special Attorneys and were directly supervised by the WDMO USA and/or her designees. One member of the prosecution team was WDMO AUSA Jess Michaelson, serving in his capacity as a Special Attorney. Two other members of the prosecution team were EDMO AUSAs Steven Holtshouser and Richard Finneran, also serving as Special Attorneys. To be clear, the exact same recusal protocol used in this case also was implemented in the *Sigillito* case.

The propriety of the appointment of Holtshouser and Finneran as Special Attorneys was raised and litigated in the *Sigillito* case. The District Court and the Court of Appeals upheld the arrangement. *See* Case No. 11-CR-00168-LRR, D.E. 436, 438, 475. *See also United States v. Sigillito*, 759 F.3d 913, 927-929 (8th Cir. 2014). Defendant Sigillito attempted to relitigate the appointment of Special Attorneys in a collateral proceeding under 18 U.S.C. § 2255. *See Sigillito v. United States*, Case No. 16-CV-00030-LRR. The district court denied the § 2255 motion and denied a certificate of appealability. (D.E. 6). The Eighth Circuit denied Sigillito's application for a certificate of appealability, and dismissed the appeal of the denial of his § 2255 motion. (D.E. 15)

In summary, just as the District Court and Eighth Circuit found that Sigillito had failed to demonstrate the presence of any actual conflict of interest, or appearance of such, on the part of Holtshouser and Finneran, this Court can and should find that Haning has failed to demonstrate the presence of any actual conflict of interest, or the appearance of such, on the part of Birmingham, Sison, and Bateman. The defense disqualification motion squarely invites the court

to override a conflict of interest process and protocol reserved for executive branch decision-making, and which received recent judicial approval in a prior similar context. This court should follow the precedent set in the *Sigillito* case and decline to accept such an improvident invitation from defendant Haning.

WHEREFORE, the Government respectfully requests that this Court deny Defendant's Motion to Dismiss, deny Defendant's alternative request to disqualify lawfully appointed Special Attorneys from representing the United States in this or any other related case, and grant such other and further relief in favor of the United States as the Court finds just and proper in this case.

Respectfully submitted,

MATTHEW G. WHITAKER  
Acting United States Attorney General

TIMOTHY A. GARRISON  
United States Attorney  
Western District of Missouri

PHILLIP EUGENE PORTER  
Criminal Division Chief  
Western District of Missouri

/s/ Kathleen D. Mahoney  
KATHLEEN D. MAHONEY #38828MO  
Special Attorney to the Attorney General

#### **CERTIFICATE OF SERVICE**

I hereby certify that on November 28, 2018, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system upon all counsel of record.

/s/ Kathleen D. Mahoney  
Kathleen D. Mahoney #38828MO  
Special Attorney to the Attorney General

## Porter, Gene (USAMOW)

---

**From:** Pena, Jaime (USAEO)  
**Sent:** Thursday, November 02, 2017 12:44 PM  
**To:** Jensen, Jeff (USAMOE); Costantin, Carrie (USAMOE); Larson, Tom (USAMOW); Porter, Gene (USAMOW); Becker, Tiffany (USAMOE); Walsh, Cari (USAMOW); Livingston, Gary (USAMOE); Rodriguez, Christy (USAMOW)  
**Cc:** Schools, Scott (ODAG) (JMD); Wilkinson, Monty (USAEO); Bell, Suzanne L. (USAEO); Macklin, Jay (USAEO); Shea, Carol (USAEO)  
**Subject:** FORMAL NOTICE: Office-wide Recusal of the Eastern District of Missouri (REC-18-413)

### MEMORANDUM FOR:

Jeffrey B. Jensen  
United States Attorney  
Eastern District of Missouri

Carrie Costantin  
First Assistant United States Attorney  
Eastern District of Missouri

Thomas Larson  
Acting United States Attorney  
Western District of Missouri

Gene Porter  
Criminal Chief  
Western District of Missouri

**THROUGH:** Scott Schools  
Associate Deputy Attorney General  
Office of the Deputy Attorney General

Jay Macklin  
General Counsel  
Executive Office for United States Attorneys

**FROM:** Jaime Pena  
Assistant United States Attorney  
Executive Office for United States Attorneys

**RE:** Office-Wide Recusal of the Eastern District of Missouri from the investigation and prosecution involving *United States v. Custom Ag. Commodities, et al.* and related matters  
(GCO File No. REC-18-413)

**THIS IS FORMAL NOTICE** that Scott Schools, Associate Deputy Attorney General (ADAG) has approved the recusal of the entire United States Attorney's Office for the Eastern District of Missouri from the case, including the investigation and prosecution, of *United States v. Custom Ag. Commodities, et al.* and related matters. The ADAG authorized this recusal in accordance with United States Attorneys' Manual (USAM) 3-2.170 and United States Attorneys' Procedures (USAP) 3-2.170.001 based upon existing conflicts of interest or the appearance of conflicts of interest pertaining to the matter.

ADAG Schools has assigned this matter to the Western District of Missouri and, pursuant to 28 U.S.C. § 515(a), has directed and authorized Acting United States Attorney Thomas Larson or his successor to conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before magistrate judges, which the United States Attorney for the Eastern District of Missouri is authorized by law to conduct regarding this matter, and related matters. *See* USAP 3-2.170.001(6)(C)(2)(b) The ADAG has authorized the following Assistant United States Attorneys and personnel from the Eastern District of Missouri to continue working on this matter under the direction of the Western District of Missouri:

AUSA Charles Birmingham  
AUSA Gil Sison  
Forfeiture AUSA Kyle Bateman  
IT Specialist-Litigation Beau Toth  
Legal Assistant Patricia Rockers  
Legal Assistant Julie Hurst

Each office should communicate directly with the other concerning transfer of information related to this matter in accordance with the procedures outlined in USAP 3-2.170.001(6)(C)(2)(b)(3). The point of contact for the Western District of Missouri is Criminal Division Chief Gene Porter, who can be reached at (816) 426-3122, and the point of contact for the Eastern District of Missouri is First Assistant United States Attorney Carrie Costantin, who can be reached at (314) 539-2200.

All Assistant United States Attorneys subsequently assigned to this matter must be appointed as Special Attorneys in order to appear on behalf of the government in the Eastern District of Missouri. *See* USAM 3-2.300 and USAP 3-2.170.001(6)(C)(2)(b). Please contact Nicole West, EOUSA Personnel Staff, Operations Division, at (202) 252-5325, to obtain the appointment.

In accordance with USAP 3-2.170.001(6)(C)(2)(b)(3), any Special Attorney assigned the matter or case should sign any pleadings or documents using the signature block of the Western District of Missouri, with the addition of the Attorney General's name preceding that of the United States Attorney.

In the event that the Western District of Missouri wants to use AUSAs from the Eastern District of Missouri to assist it in this matter(s), it must submit a request to General Counsel's Office, EOUSA, that includes (1) a detailed justification of the need for the use of an AUSA, and (2) a detailed statement of the role the AUSA would play. ADAG Schools retains the authority to approve/disapprove any such request.

## Porter, Gene (USAMOW)

---

**From:** Porter, Gene (USAMOW)  
**Sent:** Thursday, November 02, 2017 4:40 PM  
**To:** Larson, Tom (USAMOW); Ketchmark, David (USAMOW); Mahoney, Kate (USAMOW)  
**Cc:** Rodriguez, Christy (USAMOW); Wright, Sherri (USAMOW); Miles, Megan (USAMOW); Costantin, Carrie (USAMOE); Birmingham, Charles (USAMOE); Sison, Gilbert (USAMOE); Bateman, Kyle (USAMOE)  
**Subject:** FW: FORMAL NOTICE: Office-wide Recusal of the Eastern District of Missouri (REC-18-413)

Please see the notice below for a new recusal case assigned to WDMO.

WDMO will provide a supervisory chain of command so the three EDMO AUSAs listed below (Charles Birmingham, Gil Sison, and Kyle Bateman – who are excluded from the recusal that otherwise affects all other lawyers in the EDMO USAO) can continue to be the line prosecutors working this case. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Per the terms of the recusal notice, all three of the EDMO AUSAs need to be appointed as Special Attorneys in order to appear on behalf of the government in the Eastern District of Missouri. See USAM 3-2.300 and USAP 3-2.170.001(6)(C)(2)(b).

WDMO AUSA Kate Mahoney, the Chief of the Fraud and Public Corruption Unit in WDMO, will be the first line supervisor of the three EDMO line attorneys. Accordingly, she too needs to be appointed as a Special Attorney in the same manner as the three EDMO AUSAs.

Rosie – would you please contact Nicole West, EOUSA Personnel Staff, Operations Division, at (202) 252-5325, to obtain the appointments for all four AUSAs – WDMO AUSA Kate Mahoney as well as the three EDMO AUSAs.

[REDACTED]

[REDACTED]

Will keep Tom informed on all significant developments as they arise in the recusal case.

Let me know if you have any questions.

Gene

Gene Porter | Criminal Division Chief | United States Attorney's Office | Western District of Missouri | 400 East 9th St, Suite 5510, Kansas City, MO 64106 | ☎: (816) 426-3122 | 📠: (816) 426-4210 | ✉: [Gene.Porter@usdoj.gov](mailto:Gene.Porter@usdoj.gov)



U.S. Department of Justice

RECEIVED

Executive Office for United States Attorneys

NOV 14 2017

Human Resources Staff

U.S. DISTRICT COURT  
EASTERN DISTRICT OF MO  
ST. LOUIS

Suite 8017, Bicentennial Building  
600 E Street, NW  
Washington, DC 20530

(202) 252-5300  
FAX (202) 252-5301

November 14, 2017

Mr. Charles S. Birmingham  
Assistant United States Attorney  
Eastern District of Missouri  
Thomas F. Eagleton U.S. Courthouse  
111 South 10<sup>th</sup> Street, Room 20.333  
St. Louis, Missouri 63102

Dear Mr. Birmingham:

You are hereby appointed as a Special Attorney to the United States Attorney General pursuant to 28 U.S.C. § 515. Subject to the terms and conditions set forth below, you are authorized to file informations and to conduct in the Eastern District of Missouri any kind of legal proceedings, civil or criminal, including Grand Jury proceedings and proceedings before United States Magistrates which United States Attorneys are authorized to conduct.

This appointment is made subject to the following terms and conditions, with which we ask that you express your concurrence by signing this letter and returning it to me in the enclosed envelope:

1. This appointment is effective November 14, 2017, not to exceed November 13, 2019, unless extended;
2. With regard to all matters handled by you as a Special Attorney, you will report to and act under the direction of the United States Attorney General or his delegee, the United States Attorney for the Western District of Missouri.
3. During and after the term of your appointment, you will be subject to all laws, regulations and policies applicable to employees. These include, but are not limited to, the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635 et seq., Federal conflict of interest statutes 18 U.S.C. §§ 207, 208, and 209; laws restricting the disclosure of certain confidential governmental information, 18 U.S.C. § 1905 and the Freedom of Information and Privacy Acts, 5 U.S.C. § 552 and § 522a; and political activity restrictions, 5 U.S.C. § 7321 et seq.;

4. You will serve without compensation other than that which you now receive as an employee of the Department of Justice; and

5. Your appointment may be terminated at any time without cause or notice.

Please execute the enclosed Appointment Affidavit which contains the oath of office and return it to Nicole West, SAUSA Program Assistant, Operations Division within fourteen (14) days. This appointment is effective upon the execution of the required oath of office.

You must file a copy of this letter with the Clerk of the District Court to evidence this appointment.

Sincerely,



Valarie D. Mulcahy  
Assistant Director  
Human Resources Staff  
Operations Division

The foregoing terms and conditions  
are hereby agreed to and accepted:



Charles S. Birmingham

# APPOINTMENT AFFIDAVITS

SPECIAL ATTORNEY

(Position to which Appointed)

NOVEMBER 14, 2017

(Date Appointed)

DOJ

(Department or Agency)

WDMO

(Bureau or Division)

STL, MO

(Place of Employment)

I, CHARLES S. BIRMINGHAM, do solemnly swear (or affirm) that--

## A. OATH OF OFFICE

I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

## B. AFFIDAVIT AS TO STRIKING AGAINST THE FEDERAL GOVERNMENT

I am not participating in any strike against the Government of the United States or any agency thereof, and I will not so participate while an employee of the Government of the United States or any agency thereof.

## C. AFFIDAVIT AS TO THE PURCHASE AND SALE OF OFFICE

I have not, nor has anyone acting in my behalf, given, transferred, promised or paid any consideration for or in expectation or hope of receiving assistance in securing this appointment.

(Signature of Appointee)

Subscribed and sworn (or affirmed) before me this 14<sup>th</sup> day of November, 2017

at St. Louis  
(City)

Missouri  
(State)



JULIA MARIE HURST  
My Commission Expires  
May 18, 2021  
St. Louis City  
Commission #13690947

(Signature of Officer)

Commission expires 5-15-2021  
(If by a Notary Public, the date of his/her Commission should be shown)


(Title)

Note - If the appointee objects to the form of the oath on religious grounds, certain modifications may be permitted pursuant to the Religious Freedom Restoration Act. Please contact your agency's legal counsel for advice.

### STATEMENT OF APPOINTMENT CONDITIONS

I, CHARLES S. BIRMINGHAM, hereby agree to the following as a condition to my appointment pursuant to 28 U.S.C. section 515 as a Special Attorney for the District of WDMO to assist with: US v. Customs Ag Commodities, et al and will report and act under the direction of the US AG or his delegee, the USA for the WDMO.

1. If I require access to restricted information involving a matter other than that to which I have been appointed, I shall request authorization from the United States Attorney.
2. I agree to sign a Grand Jury confidentiality statement, as appropriate.

Signature: 

Date: November 14, 2017



RECEIVED

NOV 16 2017

U.S. DISTRICT COURT  
EASTERN DISTRICT OF MO  
ST. LOUIS

Human Resources Staff

U.S. Department of Justice

Executive Office for United States Attorneys

Suite 8017, Bicentennial Building  
600 E Street, NW  
Washington, DC 20530

(202) 252-5300  
FAX (202) 252-5301

November 15, 2017

Mr. Gilbert C. Sison  
Assistant United States Attorney  
Eastern District of Missouri  
Thomas F. Eagleton U.S. Courthouse  
111 South 10<sup>th</sup> Street, Room 20.333  
St. Louis, Missouri 63102

Dear Mr. Sison:

You are hereby appointed as a Special Attorney to the United States Attorney General pursuant to 28 U.S.C. § 515. Subject to the terms and conditions set forth below, you are authorized to file informations and to conduct in the Eastern District of Missouri any kind of legal proceedings, civil or criminal, including Grand Jury proceedings and proceedings before United States Magistrates which United States Attorneys are authorized to conduct.

This appointment is made subject to the following terms and conditions, with which we ask that you express your concurrence by signing this letter and returning it to me in the enclosed envelope:

1. This appointment is effective November 15, 2017, not to exceed November 14, 2019, unless extended;
2. With regard to all matters handled by you as a Special Attorney, you will report to and act under the direction of the United States Attorney General or his delegee, the United States Attorney for the Western District of Missouri.
3. During and after the term of your appointment, you will be subject to all laws, regulations and policies applicable to employees. These include, but are not limited to, the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635 et seq., Federal conflict of interest statutes 18 U.S.C. §§ 207, 208, and 209; laws restricting the disclosure of certain confidential governmental information, 18 U.S.C. § 1905 and the Freedom of Information and Privacy Acts, 5 U.S.C. § 552 and § 522a; and political activity restrictions, 5 U.S.C. § 7321 et seq.;

4. You will serve without compensation other than that which you now receive as an employee of the Department of Justice; and
5. Your appointment may be terminated at any time without cause or notice.

Please execute the enclosed Appointment Affidavit which contains the oath of office and return it to Nicole West, SAUSA Program Assistant, Operations Division within fourteen (14) days. This appointment is effective upon the execution of the required oath of office.

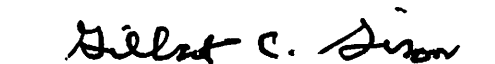
You must file a copy of this letter with the Clerk of the District Court to evidence this appointment.

Sincerely,



Valarie D. Mulcahy  
Assistant Director  
Human Resources Staff  
Operations Division

The foregoing terms and conditions  
are hereby agreed to and accepted:

  
\_\_\_\_\_  
Gilbert C. Sison

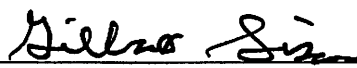
STATEMENT OF APPOINTMENT CONDITIONS

I, Gilbert Sison, hereby agree to the following as a condition to my appointment pursuant to 28 U.S.C. section 543 as a Special Assistant United States Attorney for the Western District of Missouri to assist with:

US. V. Customs Commodities, et al and will report and act under direction  
of the US AG or his delegee, the USA for the WDMO.

1. If I require access to restricted information involving a matter other than that to which I have been appointed, I shall request authorization from the United States Attorney.
2. I understand that the limitations of my access to the United States Attorney's Office is determined by the United States Attorney in that office.

Signature:

  
Gilbert Sison

Date:

November 16, 2017

# APPOINTMENT AFFIDAVITS

Special Attorney  
(Position to which Appointed)

11/15/2017  
(Date Appointed)

Department of Justice  
(Department or Agency)

USAO - WDMO  
(Bureau or Division)

St. Louis, Missouri  
(Place of Employment)

I, Gilbert Sison, do solemnly swear (or affirm) that--

## A. OATH OF OFFICE

I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

## B. AFFIDAVIT AS TO STRIKING AGAINST THE FEDERAL GOVERNMENT

I am not participating in any strike against the Government of the United States or any agency thereof, and I will not so participate while an employee of the Government of the United States or any agency thereof.

## C. AFFIDAVIT AS TO THE PURCHASE AND SALE OF OFFICE

I have not, nor has anyone acting in my behalf, given, transferred, promised or paid any consideration for or in expectation or hope of receiving assistance in securing this appointment.

Gilbert Sison  
(Signature of Appointee)

Subscribed and sworn (or affirmed) before me this 16th day of November, 2017

at St. Louis  
(City)

Missouri  
(State)



JULIA MARIE HURST  
My Commission Expires  
May 18, 2021  
St. Louis City  
Commission #13690947

Julia Marie Hurst  
(Signature of Officer)

Commission expires 5-18-2021  
(If by a Notary Public, the date of his/her Commission should be shown)

Notary Public  
(Title)

Note - If the appointee objects to the form of the oath on religious grounds, certain modifications may be permitted pursuant to the Religious Freedom Restoration Act. Please contact your agency's legal counsel for advice.



RECEIVED

NOV 16 2017

U.S. DISTRICT COURT  
EASTERN DISTRICT OF MO  
ST. LOUIS

U.S. Department of Justice

Executive Office for United States Attorneys

Human Resources Staff

Suite 8017, Bicentennial Building  
600 E Street, NW  
Washington, DC 20530

(202) 252-5300  
FAX (202) 252-5301

November 15, 2017

Mr. Kyle T. Bateman  
Assistant United States Attorney  
Eastern District of Missouri  
Thomas F. Eagleton U.S. Courthouse  
111 South 10<sup>th</sup> Street, Room 20.333  
St. Louis, Missouri 63102

Dear Mr. Bateman:

You are hereby appointed as a Special Attorney to the United States Attorney General pursuant to 28 U.S.C. § 515. Subject to the terms and conditions set forth below, you are authorized to file informations and to conduct in the Eastern District of Missouri any kind of legal proceedings, civil or criminal, including Grand Jury proceedings and proceedings before United States Magistrates which United States Attorneys are authorized to conduct.

This appointment is made subject to the following terms and conditions, with which we ask that you express your concurrence by signing this letter and returning it to me in the enclosed envelope:

1. This appointment is effective November 15, 2017, not to exceed November 14, 2019, unless extended;
2. With regard to all matters handled by you as a Special Attorney, you will report to and act under the direction of the United States Attorney General or his delegate, the United States Attorney for the Western District of Missouri.
3. During and after the term of your appointment, you will be subject to all laws, regulations and policies applicable to employees. These include, but are not limited to, the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635 et seq., Federal conflict of interest statutes 18 U.S.C. §§ 207, 208, and 209; laws restricting the disclosure of certain confidential governmental information, 18 U.S.C. § 1905 and the Freedom of Information and Privacy Acts, 5 U.S.C. § 552 and § 522a; and political activity restrictions, 5 U.S.C. § 7321 et seq.;

Attachment 4

4. You will serve without compensation other than that which you now receive as an employee of the Department of Justice; and
5. Your appointment may be terminated at any time without cause or notice.

Please execute the enclosed Appointment Affidavit which contains the oath of office and return it to Nicole West, SAUSA Program Assistant, Operations Division within fourteen (14) days. This appointment is effective upon the execution of the required oath of office.

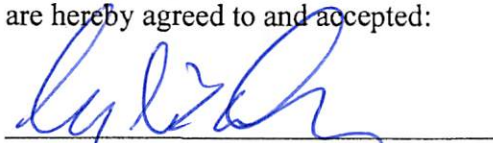
You must file a copy of this letter with the Clerk of the District Court to evidence this appointment.

Sincerely,



Valarie D. Mulcahy  
Assistant Director  
Human Resources Staff  
Operations Division

The foregoing terms and conditions  
are hereby agreed to and accepted:

  
\_\_\_\_\_  
Kyle T. Bateman

# APPOINTMENT AFFIDAVITS

Special Attorney  
(Position to which Appointed)

11/15/2017  
(Date Appointed)

Department of Justice  
(Department or Agency)

USAO - WDMO  
(Bureau or Division)

St. Louis, Missouri  
(Place of Employment)

I, Kyle Bateman, do solemnly swear (or affirm) that--

## A. OATH OF OFFICE

I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

## B. AFFIDAVIT AS TO STRIKING AGAINST THE FEDERAL GOVERNMENT

I am not participating in any strike against the Government of the United States or any agency thereof, and I will not so participate while an employee of the Government of the United States or any agency thereof.

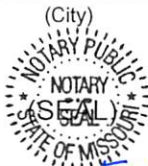
## C. AFFIDAVIT AS TO THE PURCHASE AND SALE OF OFFICE

I have not, nor has anyone acting in my behalf, given, transferred, promised or paid any consideration for or in expectation or hope of receiving assistance in securing this appointment.

  
(Signature of Appointee)

Subscribed and sworn (or affirmed) before me this 16th day of November, 2017

at St. Louis Missouri  
(City) (State)



JULIA MARIE HURST  
My Commission Expires  
May 18, 2021  
St. Louis City  
Commission #13690947

  
(Signature of Officer)

Commission expires 5-18-2021  
(If by a Notary Public, the date of his/her Commission should be shown)

Notary Public  
(Title)

Note - If the appointee objects to the form of the oath on religious grounds, certain modifications may be permitted pursuant to the Religious Freedom Restoration Act. Please contact your agency's legal counsel for advice.

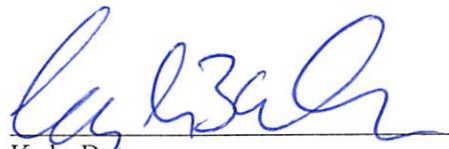
STATEMENT OF APPOINTMENT CONDITIONS

I, Kyle Bateman, hereby agree to the following as a condition to my appointment pursuant to 28 U.S.C. section 543 as a Special Assistant United States Attorney for the Western District of Missouri to assist with:

US. V. Customs Commodities, et al and will report and act under direction of the US AG or his delegee, the USA for the WDMO.

1. If I require access to restricted information involving a matter other than that to which I have been appointed, I shall request authorization from the United States Attorney.
2. I understand that the limitations of my access to the United States Attorney's Office is determined by the United States Attorney in that office.

Signature:

  
Kyle Bateman

Date:

November 16, 2017



**U.S. Department of Justice**

Executive Office for United States Attorneys

Human Resources Staff

Suite 8017, Bicentennial Building  
600 E Street, NW  
Washington, DC 20530

(202) 252-5300  
FAX (202) 252-5301

November 14, 2017

Ms. Kathleen D. Mahoney  
Assistant United States Attorney  
Western District of Missouri  
Charles E. Whittaker Courthouse  
400 East 9<sup>th</sup> Street  
Kansas City, Missouri 64106

Dear Ms. Mahoney:

You are hereby appointed as a Special Attorney to the United States Attorney General pursuant to 28 U.S.C. § 515. Subject to the terms and conditions set forth below, you are authorized to file informations and to conduct in the Eastern District of Missouri any kind of legal proceedings, civil or criminal, including Grand Jury proceedings and proceedings before United States Magistrates which United States Attorneys are authorized to conduct.

This appointment is made subject to the following terms and conditions, with which we ask that you express your concurrence by signing this letter and returning it to me in the enclosed envelope:

1. This appointment is effective November 14, 2017, not to exceed November 13, 2019, unless extended;
2. With regard to all matters handled by you as a Special Attorney, you will report to and act under the direction of the United States Attorney General or his delegate, the United States Attorney for the Western District of Missouri;
3. During and after the term of your appointment, you will be subject to all laws, regulations and policies applicable to employees. These include, but are not limited to, the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635 *et seq.*, Federal conflict of interest statutes 18 U.S.C. §§ 207, 208, and 209; laws restricting the disclosure of certain confidential governmental information, 18 U.S.C. § 1905 and the Freedom of Information and Privacy Acts, 5 U.S.C. § 552 and § 522a; and political activity restrictions, 5 U.S.C. § 7321 *et seq.*;

4. You will serve without compensation other than that which you now receive as an employee of the Department of Justice; and
5. Your appointment may be terminated at any time without cause or notice.

Please execute the enclosed Appointment Affidavit which contains the oath of office and return it to Nicole West, SAUSA Program Assistant, Operations Division within fourteen (14) days. This appointment is effective upon the execution of the required oath of office.

You must file a copy of this letter with the Clerk of the District Court to evidence this appointment.

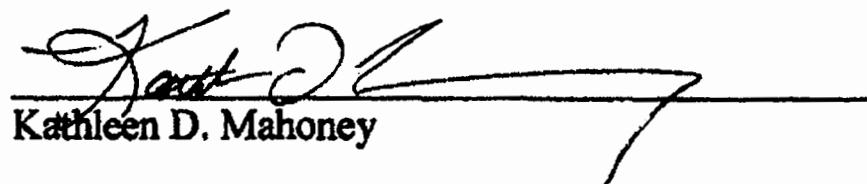
Sincerely,



Valarie D. Mulcahy  
Assistant Director  
Human Resources Staff  
Operations Division

Enclosure

The foregoing terms and conditions  
are hereby agreed to and accepted:

  
Kathleen D. Mahoney

# APPOINTMENT AFFIDAVITS

Special Attorney

(Position to which Appointed)

11/14/2017

(Date Appointed)

Department of Justice

(Department or Agency)

U. S. Attorney's Office

(Bureau or Division)

Eastern District of Missouri

(Place of Employment)

I, Kathleen D. Mahoney, do solemnly swear (or affirm) that--

## A. OATH OF OFFICE

I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

## B. AFFIDAVIT AS TO STRIKING AGAINST THE FEDERAL GOVERNMENT

I am not participating in any strike against the Government of the United States or any agency thereof, and I will not so participate while an employee of the Government of the United States or any agency thereof.

## C. AFFIDAVIT AS TO THE PURCHASE AND SALE OF OFFICE

I have not, nor has anyone acting in my behalf, given, transferred, promised or paid any consideration for or in expectation or hope of receiving assistance in securing this appointment.

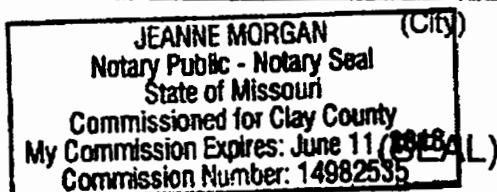
  
(Signature of Appointee)

Subscribed and sworn (or affirmed) before me this 14 day of November, 2017

at Kansas City

Missouri

(State)



  
(Signature of Officer)

Commission expires June 11, 2018

(If by a Notary Public, the date of his/her Commission should be shown)

Acting United States Attorney  
(Title)

Note - If the appointee objects to the form of the oath on religious grounds, certain modifications may be permitted pursuant to the Religious Freedom Restoration Act. Please contact your agency's legal counsel for advice.